CORRECTED COPY

No. 83-245

IN THE

Supreme Court of the United States

October Term, 1983

PENSION BENEFIT GUARANTY CORPORATION,
Appellant,

v.

R.A. GRAY & COMPANY,
Appellee.

On Appeal From the United States Court of Appeals For the Ninth Circuit

---

JURISDICTIONAL STATEMENT

HENRY ROSE
General Counsel

*BARUCH A. FELLNER
Associate General Counsel

J. STEPHEN CAFLISCH
Special Counsel

PETER H. GOULD
TERENCE G. CRAIG
PETER MICHAELS
DAVID F. POWER
Attorneys

PENSION BENEFIT GUARANTY CORPORATION
2020 K Street, N.W.
Washington, D.C. 20006
(202) 254-3010

*Counsel of Record

OF COUNSEL:
NATHAN LEWIN
Miller, Cassidy, Larroca & Lewin
2555 M Street, N.W.
Suite 500
Washington, D.C. 20037
(202) 293-6400

THE CASILLAS PRESS, INC. – 1717 K Street N.W. – Washington, D.C. – 223-1220

QUESTION PRESENTED

Whether, in enacting the Multiemployer Pension Plan Amendments Act of 1980, Congress could provide that it take effect on a date prior to its enactment so as to prevent the frustration of the law's rational purposes.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases:

Page

Page

Page

Constitution, statutes and regulations:

Page

Page

IN THE

Supreme Court of the United States

October Term, 1983

No.

PENSION BENEFIT GUARANTY CORPORATION and OREGON-WASHINGTON CARPENTERS-EMPLOYERS PENSION TRUST FUND,

Appellants,

v.

R.A. GRAY & COMPANY,

Appellee.

On Appeal From the United States Court of Appeals For the Ninth Circuit

---

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the court of appeals (App. A, pp. 1a-29a, *infra*) is reported at 705 F.2d 1502. The opinion of the district court (App. B, pp. 30a-49a, *infra*) is reported at 549 F.Supp. 531.

JURISDICTION

The district court had jurisdiction of this action under 29 U.S.C. § 1451(c). The judgment of the court of appeals, holding an Act of Congress unconstitutional, was entered on May 20, 1983. A notice of appeal to this Court was filed

on June 15, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1252.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant provisions of the Constitution and of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.* (1976 and Supp. V 1981), *as amended by* the Multiemployer Pension Plan Amendments Act of 1980, 94 Stat. 1208 *et seq.*, are set forth in Appendix F, pp. 76a-104a, *infra.*

STATEMENT

This appeal concerns the constitutionality of the provision of the Multiemployer Pension Plan Amendments Act of 1980 (the "Multiemployer Act"), 94 Stat. 1208 *et seq.*, *amending* 29 U.S.C. §§ 1001 *et seq.* (1976), which imposes "withdrawal liability" on employers who withdraw from a multiemployer pension plan[1] prior to the enactment of the Multiemployer Act but after April 29, 1980. 29 U.S.C. § 1381. (Supp. V 1981.) This important date in the legislative development of the Multiemployer Act was incorporated into 29 U.S.C. § 1461(e)(2)(A) as the effective date for the Multiemployer Act's withdrawal liability provisions. (P. 7, *infra.*) In a declaratory judgment action brought by a withdrawing employer who challenged this "retroactivity" clause, the district court granted summary judgment for the defendants, holding that the retroactive effective date was rational and therefore did not deny due

[1] A multiemployer plan is one "to which more than one employer is required to contribute" under the terms of "one or more collective bargaining agreements between one or more employee organizations and more than one employer." 29 U.S.C. § 1002(37)(A) (Supp. V 1981). Approximately two thousand such plans provide pension coverage to eight million American workers and their families.

process. (p. 9, *infra.*) The court of appeals reversed on the ground that application of the Multiemployer Act to withdrawals occurring prior to its date of enactment would violate the "employers' rights to due process as guaranteed by the fifth amendment." (Pp. 9-10, *infra.*)

1. Background of the Multiemployer Act

In 1974, after substantial public concern had been expressed over the operation of private pension plans which affected approximately 36 million American workers and their families, Congress enacted ERISA. 88 Stat. 829 *et seq.*, 29 U.S.C. §§ 1001 *et seq.* (1976). This statute comprehensively regulated private pension plans – their funding, management, benefit provisions, and insurance.

Title IV of ERISA created the Pension Benefit Guaranty Corporation (the "PBGC") as a wholly-owned government corporation and an independent federal agency. ERISA assigned to the PBGC the task of administering a program of insurance to cover the payment of certain pension benefits to employees who participated in terminated plans. 29 U.S.C. § 1302(a) (1976). Congress had found that "owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits . . . ." 29 U.S.C. § 1001(a), *quoted in Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 362.[2] The 1974 law prescribed that if a

[2]For example, when the Studebaker Corporation terminated a plan covering its South Bend, Indiana employees in 1964, over 4,000 vested participants lost 85% of their expected benefits. Legislative History of the Employee Retirement Income Security Act of 1974, Public Law 93-406, prepared by the Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate at 208 and 214.

pension plan subject to Title IV terminated with insufficient assets to provide benefits guaranteed under 29 U.S.C. § 1322, the PBGC would become responsible for payment of those guaranteed benefits. 29 U.S.C. § 1361.

For plans that were maintained by a single employer, the PBGC's obligation to pay guaranteed benefits was effective for plans that terminated on or after July 1, 1974. 29 U.S.C. § 1381 (1976). The guaranteed payment of multiemployer plan benefits, however, was not to be mandatory until January 1, 1978. 29 U.S.C. § 1381(c)(1) (1976). In the intervening period, the PBGC was authorized to determine whether to pay such benefits upon plan termination on a case-by-case basis. 29 U.S.C. § 1381(c)(2) (1976).

Title IV imposed liability to the PBGC upon an employer that terminated a single-employer plan, up to the full amount of the plan's statutory insufficiency. 29 U.S.C. § 1362(b).[3] Where the PBGC exercised its discretion to pay guaranteed benefits due under a terminated

---

[3]The courts of appeals have repeatedly rejected constitutional challenges to ERISA's imposition of liability on employers that terminate single-employer plans. *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 592 F.2d 947 (7th Cir. 1979), *cert. denied on constitutional question, cert. granted on statutory question*, 442 U.S. 940 (1979), *aff'd*, 446 U.S. 359 (1980) *reh'g denied*, 448 U.S. 908 (1980); *Pension Benefit Guaranty Corp.* v. *Quimet Corp.*, 630 F.2d 4 (1st Cir. 1980), *cert. denied*, 450 U.S. 914 (1981); *A-T-O, Inc. v. Pension Benefit Guaranty Corp.*, 634 F.2d 1013 (6th Cir. 1980). Additionally, several lower courts have concluded that this Court, *sub silentio*, upheld the constitutionality of single-employer liability in its affirmance of the Seventh Circuit's statutory holding in *Nachman. A-T-O, supra*, 634 F.2d at 1024; *Peick, v. Pension Benefit Guaranty Corp.*, 539 F. Supp. 1025, 1040 (N.D. Ill. E.D. 1982) (Getzendanner, J.) (7th Cir. Appeal No. 82-2081 pending); *Textile Workers Pension Fund v. Standard Dye & Finishing Co.*, 549 F. Supp. 404, 406 (S.D. N.Y. 1982) (Sprizzo, J.) (2nd Cir. Appeal No. 83-7004 pending).

multiemployer plan, employers that had contributed to the plan during the five-year period preceding its termination were subject to liability to the PBGC, up to the plan's statutory insufficiency, in amounts proportional to their share of the plan's contributions during that period. 29 U.S.C. § 1364 (1976). Thus, after the enactment of ERISA in 1974, any employer withdrawing from a continuing multiemployer plan was subject to a contingent funding liability which depended only upon whether the plan survived the next five years and on whether the PBGC assumed discretionary responsibility to pay the plan's guaranteed benefits.

In 1977, Congress became concerned that the January 1, 1978 implementation of mandatory guarantees for multiemployer plans might induce several large multiemployer plans to terminate, subjecting the insurance system to a liability that would have "an adverse impact on the entire private pension system." 123 Cong. Rec. S18637 (daily ed. November 3, 1977) (statement of Sen. Bentsen). Congress directed the PBGC to prepare a comprehensive report analyzing the problems of multiemployer plans and it delayed the effective date of the mandatory guarantees, extending the PBGC's discretionary authority through June 30, 1979. Pub. L. 95-214, 91 Stat. 1501 (1977). (App. G, pp. 105a-106a, *infra.*)[4]

[4]The effective date for mandatory coverage of multiemployer plans was subsequently deferred to May 1, 1980 (93 Stat. 70 (1979)), to July 1, 1980 (94 Stat. 341 (1980)), and to August 1, 1980 (94 Stat. 610 (1980)). It was then superseded by enactment of the Multiemployer Act.

2. Enactment of the Multiemployer Act

The PBGC submitted its report to Congress on July 1, 1978. The report emphasized the danger that employer withdrawals would weaken the contribution bases of multiemployer plans, interrupting the stream of contributions supporting employee vested benefits, subjecting remaining employers to increased obligations, and precipitating further withdrawals. Ultimately, employer withdrawals might compel plan terminations and, as a consequence, greatly increase the obligations of the insurance system. Such obligations, funded through the payment of premiums, could require exorbitantly high premium increases affecting all employers who contribute to multiemployer plans. In order to discourage employer withdrawals and to mitigate the impact of withdrawals that occurred, the PBGC proposed that a withdrawing employer be subject to a fixed liability on withdrawal equal to the employer's proportional share of a plan's unfunded vested liability, i.e., the amount by which the actuarial value of vested benefits exceeded plan assets. (App. H, pp. 115a-116a, *infra*.) Such defined withdrawal liability was included in the legislative recommendations submitted to Congress by the PBGC on February 27, 1979. 126 Cong. Rec. S10099 (daily ed. July 29, 1980) (statement of Sen. Javits).

Congress was concerned that employers would be encouraged to withdraw prior to enactment in order to avoid withdrawal liability, thereby shifting their funding obligations to remaining employers, and precipitating the financial erosion of multiemployer plans the proposed amendments were designed to prevent. In order to prevent employers from preempting the will of Congress, the bills introduced specified February 27, 1979 — the day of the

PBGC's transmittal of its proposed legislation — as the effective date for the new withdrawal liability formula. That date was included in the bills introduced in both Houses on May 3, 1979. H.R.3904, 96th Cong., 1st Sess. § 108; S.1076, 96th Cong., 1st Sess. § 108.

By April 29, 1980, substantially identical bills had been approved by two Committees in the House and one in the Senate, all with the originally suggested effective date for withdrawal liability. When the Senate Finance Committee, the last of the four congressional committees responsible for the legislation, indicted it needed more time, Congress delayed the mandatory payment of multiemployer plan benefits provided in ERISA from May 1 to July 1, 1980 (see note 4, *supra*). The Finance Committee stressed, however, that it did not want to encourage employers to withdraw from multiemployer plans while additional work was being done on the bill. Senator Bentsen, who was chairman of the Subcommittee on Private Pension Plans, said on the Senate floor on April 29, 1980:

> The feeling of the Senate Finance Committee was that this bill should not encourage employers to withdraw from a multiemployer plan between now and July 1, 1980. Any withdrawals after April 28, 1980, will be covered by any withdrawal liability rules that the committee might adopt. 126 Cong. Rec. S4302-03 (daily ed.)

The Senate Finance Committee then proposed a delay of the effective date of the withdrawal liability provisions from February 27, 1979 to April 29, 1980. On May 22, 1980, the House passed its version of the bill by a vote of 374-0. 126 Cong. Rec. H4170 (daily ed.). The Senate passed its version by a vote of 85-1 on July 29, 1980. 126 Cong. Rec. S10169 (daily ed.). President Carter signed the Multiemployer Act into law on September 26, 1980.

3. The Facts of this Case

Under a series of collective bargaining agreements with the Oregon State Council of Carpenters, beginning in 1964, the appellee ("Gray"), a construction industry employer, contributed to co-appellant Oregon-Washington Carpenters-Employers Pension Trust Fund (the "Trust Fund"), a multiemployer pension plan. In February, 1980, Gray notified the union that it would not renew its collective bargaining agreement. (App. B at 32a, *infra*.) That agreement expired on May 31, 1980, and Gray's contributions to the Trust Fund ceased on that date.

On July 24, 1981, the Fund's trustees formally notified Gray, pursuant to the Multiemployer Act, that Gray was deemed to have withdrawn from the Trust Fund as of June 1, 1980, and that its withdrawal liability was $201,359. Payment pursuant to a quarterly schedule, as authorized by 29 U.S.C. § 1399, was demanded.

4. The Litigation

Gray instituted a declaratory judgment action in the United States District Court for the District of Oregon on September 29, 1981. Gray's action named the PBGC and the Trust Fund as defendants. Choosing not to challenge the amount of its liability (which was subject to compulsory arbitration under 29 U.S.C. § 1401),[3] Gray maintained that the Multiemployer Act could not constitutionally impose withdrawal liability on employers who had terminated their participation in a multiemployer pension

[3]Gray initially sought a preliminary injunction against enforcement of the Multiemployer Act. The district court denied the injunction and ruled that constitutional issues would be resolved only after the amount of Gray's liability had been determined through the exhaus-

fund prior to the effective date of the Multiemployer Act.[6] On cross-motions for summary judgment, the district court (Redden, J.) found that "Gray has not shown that the [Multiemployer Act] and its retroactive application are irrational solutions to a serious problem." 549 F.Supp. at 538. (App. B at 43a, *infra.*) The court held the Multiemployer Act constitutional and entered judgment for the defendants. 549 F.Supp. at 540.

The court of appeals reversed in an opinion which was rendered in this case and in five related appeals growing out of other litigation.[7] Weighing the "reliance interests" of employers subject to the Multiemployer Act, the court found that it "was not certain . . . that the Amendments Act would be enacted and would have a retroactive

---

tion of statutorily mandated arbitration proceedings. Gray then asked the trustees to review their determination, as provided in 29 U.S.C. § 1399 (Supp. V 1981). After the original determination was reviewed, Gray accepted that determination and did not request arbitration under 29 U.S.C. § 1401 (Supp. V 1981). 549 F.Supp. at 534. (App. B at 33a, *infra.*)

[6]Gray also challenged the compulsory arbitration provision on the ground that it violated procedural due process and the constitutional guarantee of trial by jury. However, the district court held that because Gray had waived its right to arbitration, it lacked standing to challenge the constitutionality of the statutory procedures. 549 F.Supp. at 539. (App. B at 46a, *infra.*)

[7]The PBGC was not made a party in the district court at the inception of the other litigation. In a portion of the opinion dealing only with that case, the court of appeals considered and decided questions relating to the timeliness of the PBGC's motions to intervene. (App. A, pp. 10a-13a, *infra.*) Those issues are not, of course, subject to a right of appeal under 28 U.S.C. § 1252, and they will be presented to this Court, if necessary, through other appropriate procedural avenues.

effect," and it therefore rejected the proposition that "employers should have known of the status of the pending legislation and should have known that the Act, when passed, would have a retroactive effect." (App. A at 19a, *infra.*)

The court of appeals then balanced the equities of the Multiemployer Act, challenging the wisdom of Congress. The court of appeals principally relied on *Railroad Retirement Board v. Alton Railroad,* 295 U.S. 330 (1935), which, according to the court, resembled this case in that "a harsh burden [was] imposed upon the employers for a completed transaction." (App. A at 24a, *infra.*) Finding also that the effective date for withdrawal liability in the Multiemployer Act was "arbitrarily fixed" and that "[o]ther legislative programs would have served the same purpose of ensuring financially healthy multiemployer plans" (App. A at 25a, *infra*) the court concluded that the Fifth Amendment's Due Process Clause was violated by the Multiemployer Act's retroactivity.

THE ISSUE IS SUBSTANTIAL

The fact that the court of appeals, in a six-page discussion, invalidated a law of Congress adopted with virtual unanimity would itself be sufficient grounds to warrant plenary review by this Court of the decision below.[8] In addition, however, this case satisfies the standards which ordinarily govern discretionary review under Rule 17 of this Court's Rules. The decision rendered by the Ninth Circuit conflicts with the rationale of rulings of other federal

[8]The Multiemployer Act was adopted after lengthy consideration by Congress, with the support of a broad coalition of business, labor, and public interest groups. 126 Cong. Rec. S10100 (daily ed., July 29, 1980) (statement of Sen. Javits).

appellate and trial courts and it is inconsistent with applicable decisions of this Court. Moreover, the Ninth Circuit has erroneously decided an important question of federal constitutional law that should be ruled on by this Court.

1. **The effect of the Ninth Circuit's decision is substantial and, if left undisturbed, will have significant harmful consequences.**

During the five-month period between April 29, 1980, and September 26, 1980, a considerable number of employers who had been contributing to multiemployer pension plans terminated their association with such plans. More than 70 such employers who were assessed withdrawal liabilities have filed lawsuits challenging the constitutionality of the retroactivity of the Multiemployer Act.[9] The total withdrawal liability assessed in these suits is $64,609,110. Consequently, this case is not a unique dispute involving a single employer. Widespread application of the Ninth Circuit's decision would result in the transfer of a large funding responsibility from withdrawn employers to those still contributing to their plans. Furthermore, the rationale applied by the Ninth Circuit casts doubt on Congress' power in the future to fix effective dates for legislation during the course of legislative debate and to discourage last-minute actions designed to frustrate the effect of new laws.

[9]App. E, pp. 53a-75a, *infra*, is a list of the actions known to the PBGC that are now pending in various federal courts. The list does not include numerous collection actions for withdrawal liability instituted by pension trusts to which withdrawing employers have interposed constitutional defenses.

2. The Ninth Circuit's decision is inconsistent with decisions of the Second Circuit and of the Court of Claims.

The central issue in this case is whether Congress may rationally act to discourage last-minute efforts to nullify the economic impact of legislation that is on the verge of enactment, by announcing that a pending bill, if enacted into law, will take effect as of a date during the final stages of Congress' deliberation, and then incorporating that date into law. The issue is further narrowed by the special circumstances in this case surrounding the imposition of a retroactive effective date; (1) such a provision had been a consistent feature of this legislation during two years of consideration and (2) the date finally enacted into law was advanced by some 14 months, thereby coinciding with major congressional committee action. It is, therefore, readily apparent that the issue in this case is not whether Congress may select an arbitrary date in the distant past, before challenged legislation has been introduced or considered, and make the law apply as of the earlier date.

A strikingly similar problem confronted Congress in 1963 and 1964, when the Executive Branch, in order to limit the flow of capital from the United States, sought to impose an excise tax on foreign-issue stock purchased by American citizens. On July 18, 1963, President Kennedy sent a message to Congress accompanied by proposed legislation which became the Interest Equalization Tax Act of 1964, 78 Stat. 809, Pub. L. No. 88-563 (Sept. 2, 1964), 26 U.S.C. §§ 4911 *et seq.* The bill, which was not finally enacted until September 2, 1964, applied to all transactions occurring after the date of President Kennedy's message, making the statute effectively "retroactive" by almost 14 months. Pub. L. No. 88-563, § 2(c); S. Rep. No. 1267, 88th Cong., 2d Sess. (1964), *reprinted in* [1964] U.S. CODE CONG & AD. NEWS 3478, 3486, 3500.

In *United States v. Binder,* 453 F.2d 805 (2d Cir. 1971), *cert. denied,* 407 U.S. 920 (1972), individuals who had been criminally convicted for evading the Interest Equalization Tax challenged its retroactivity. The Second Circuit upheld the statute's constitutionality, deferring to Congress' justification for the law's retroactivity: "[t]o curb the capital flow while Congress was considering the legislation and to avoid arbitrage speculation." 453 F.2d at 806.[10]

By the same rationale, the Court of Claims upheld the retroactivity of the 1964 law in *First National Bank in Dallas v. United States,* 420 F.2d 725 (Ct. Cl. 1970), *cert. denied,* 398 U.S. 950 (1970). The court said (420 F.2d at 730, footnote omitted):

> [I]t is our view that where there is a reasonable cause to believe or expect that a tax will be imposed on a presently nontaxable transaction, the retrospective application of such tax does not constitute a denial of due process.

The effective date for termination liability under the Multiemployer Act was no surprise to those who were subject to it. Federal courts other than the Ninth Circuit have observed that during the five-month period between April

---

[10]The Second Circuit quoted approvingly a commentator's observation that "a prospective date for the Interest Equalization Tax would have made it a fruitless – if not counterproductive exercise. . . . Without a retroactive effective date from the time of announcement, the outflow of capital in an extremely short period of time would have been so great that Congress could not have afforded to act." *Note,* 84 HARV. L. REV. 436, 445 (1970). Here, similarly, retroactive application was necessary "to prevent employers from withdrawing in droves from multiemployer plans once they anticipated passage of [the Multiemployer Act]." *Coronet Dodge, Inc. v. Speckmann,* 553 F. Supp. 518, 521 (E.D. Mo., E.D. 1982) (Filippine, J.) (8th Cir. Appeal No. 82 2554-EM).

29, 1980 and the date on which the Multiemployer Act became law "there was strong evidence to suggest that [the Multiemployer Act] was likely to pass and that it would be retrospective when it did." *Peick v. Pension Benefit Guaranty Corp.*, 539 F.Supp. 1025, 1053 (N.D. Ill. E.D. 1982), *appeal pending*, No. 82-2081, 7th Cir. Noting that it was "hardly credible" that an employer had no actual notice of such retroactivity, another court said that "[an employer's] ignorance must have resulted from a culpable failure to acquaint itself with information publicly available." *Textile Workers Pension Fund v. Standard Dye & Finishing Co.*, 549 F. Supp. 404, 409 n.8 (S.D. N.Y. 1982), *appeal pending*, No. 83-7004, 2d Cir.[11] In

[11]Both the *Peick* and *Textile Workers* decisions upheld the Multiemployer Act in its entirety, including its retroactive application, as have the great majority of district court decisions. *See also Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund*, 3 Employee Benefits Cases 2545 (E.D. Va. 1982); *Transport Motor Express, Inc. v. Central States, Southeast and Southwest Areas Pension Fund*, No. 81-C-4535 (N.D. Ill. 1983); *Coronet Dodge, Inc. v. Speckmann*, 553 F. Supp. 518 (E.D. Mo. 1982); *Pacific Iron & Metal Co. v. Western Conference of Teamsters Pension Trust Fund*, 553 F. Supp. 523 (W.D. Wash. 1982); *Bakersfield Concrete Construction, Inc. v. Construction Laborers Pension Trust for Southern California*, C.A. No. 82-0044-WPG (C.D. Ca. 1983); *Board of Trustees of the Western Conference of Teamsters Pension Trust Fund v. J.N. Ceazan*, C.A. No. 82-4092-SAW (N.D. Ca. 1983); *Speckmann v. Paddock Chrysler-Plymouth, Inc.* No. 82-0888-C(C) (E.D. Mo. 1983); and *R.A. Gray & Co. v. Oregon-Washington Carpenters-Employers Pension Trust Fund*, 549 F. Supp. 531 (D. Or. 1982). *But see Shelter Framing Corp. v. Carpenters Pension Trust for Southern California*, 705 F.2d 1502 (9th Cir. 1983); *Grano Steel Corp. v. Shopmen's Ironworkers Pension Plan of Southern California*, C.A. No. CV 81-5862-LEW (C.D. Ca. 1982); *Republic Industries, Inc. v. New England Teamsters Fund*, No. 81-2551-S (D. Mass. 1983); and *Sibley, Lindsey & Curr Co. v. Bakery, Confectionery and Tobacco Workers Union*, C.A. No. 82-555T (W.D. N.Y. 1983). The Multiemployer Act's post-enactment operation has been upheld by every court that has considered a constitutional challenge to it.

these circumstances, the constitutionality of the "retroactive" application of the Multiemployer Act's withdrawal liability provisions is supported by the constitutionality of the Interest Equalization Tax Act of 1964. The decision of the Ninth Circuit conflicts with the rulings upholding the 1964 law.[12]

Cleveland Metal Products Co., Inc. v. Teamster Local No. 507 Pension Fund, C.A. No. C81-2543 (N.D. Ohio, E.D. 1983); *Eberhard Foods, Inc. v. Retail Store Employees Union AFL-CIO and Food Employees Joint Pension Fund,* C.A. No. G-82-23 CA1 (W.D. Mich. S.D. 1983); *S & M Paving, Inc. v. Construction Laborers Pension Trust for Southern California,* 539 F. Supp. 867 (C.D. Ca. 1982); *Victor Construction Company, Inc. v. Construction Laborers Pension Trust for Southern California,* 3 Employee Benefits Cases 1763 (C.D. Ca. 1982); *Washington Star Co. v. International Typographical Union Negotiated Pension Plan,* 4 Employee Benefits Cases 1145 (D.D.C. 1983); *Kinsora, v. Vornado, Inc.,* C.A. No. 82-1034 (D.N.J. 1983); *IUE AFL-CIO Pension Fund v. Erie Universal Products Corp.,* C.A. No. 82-2252 (D. N.J. 1983); *Trustees of Retirement Fund of Fur Manufacturing Industry v. Lazar-Wisotzky, Inc.,* No. 82-CIV-0880 (LBS) (S.D. N.Y. 1983); and *Republic Industries, Inc.* v. *New England Teamsters Fund, supra.*

[12]The constitutionality of this kind of retroactivity is not limited to statutes that may be characterized as "tax laws." The same reasoning as governs "tax laws" is applicable, as well, to any form of economic regulation, particularly one in which liability is imposed to insure that the reasonable contractual expectations of a large segment of society – such as the employers that continue to contribute to multiemployer plans and the participants in those plans – are realized. Indeed, the Court of Claims in *First National Bank in Dallas, supra,* emphasized that the Interest Equalization Tax Act was principally a *regulatory* enactment rather than a revenue-producing law, and concluded that the Act's regulatory purpose strengthened the case for its retroactive application. 420 F.2d at 729-30. *See also Gifford v. Thorp Finance Corp.,* 688 F.2d 447, 458 & n.13 (7th Cir. 1982) (*en banc*). (This Court's decision in *U.S. v. Security Industrial Bank,* ____ U.S. ____, 51 U.S.L.W. 4007, while displacing the Seventh Circuit's ruling in *Gifford,* is not inconsistent with *Gifford's* due process analysis.)

3. The Ninth Circuit's decision conflicts with this Court's authoritative rulings on retroactivity.

On a number of occasions, this Court and other courts have approved laws with retroactive effective dates,[13] as well as laws retroactive not in form but in their effect on closed transactions.[14] As this Court observed in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15-16 (1976):

---

[13] *See, e.g., United States v. Darusmont,* 449 U.S. 292 (1981) (per curiam) (retroactive application of minimum tax provisions of Internal Revenue Code amendments); *Lichter v. United States,* 334 U.S. 742, 777, 789 (1948) (October 1942 amendments to Renegotiation Act made retroactive to date of original act in April 1942); *Fleming v. Rhodes,* 331 U.S. 100 (1947) (Price Control Extension Act backdated to cover time when original Emergency Price Control Act had expired); *United States v. Hudson,* 299 U.S. 498 (1937) (retroactive application of federal tax on silver trading); *Newport News Shipbuilding & Dry Dock Co. v. United States,* 374 F.2d 516, 525, n. 10 (Ct. Cl. 1967) (Renegotiation Act passed in September 1954 backdated to first of year); *Eastern Machinery Co. v. Under Secretary of War,* 182 F.2d 99, 100 (D.C. Cir. 1950) (July 1943 amendment to Reconstruction Act held constitutionally made retroactive to April 1942).

[14] *See, e.g., Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976) (black lung benefits extended to coal miners who had quit jobs before legislation enacted); *International Union of Electrical, Radio & Machine Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976) (Congressional modification of a statute of limitations could apply retroactively to revive barred action); *Home Building & Loan Association v. Blaisdell,* 290 U.S. 398 (1934) (state depression statute to protect homeowners from foreclosure held not to violate due process even though it affected already existing mortgages); *Gifford v. Thorp Finance Corp., supra,* n.12, (exemption of household goods from lien, as provided for by Bankruptcy Reform Act of 1978, held constitutionally applicable to loan agreement entered before bankruptcy act enacted); *Travelers Insurance Co. v. Marshall,* 634 F.2d 843 (5th Cir. 1981) (expansion of death benefits for longshoremen held constitutionally applicable to those injured before amendment expanding benefit was enacted; (*see also* cases cited in *Travelers* upholding the law in other circuits); *United States v. Perry,* 431 F.2d 1020 (9th Cir. 1970) (1960 Amendment to Anti-Kickback Act held applicable to kickback made ten years earlier).

> It is by now well established that legislative acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way. . . . And this court long ago upheld against due process attack the competence of Congress to allocate the interlocking economic rights and duties of employers and employees upon workmen's compensation principles analogous to those enacted here, regardless of contravening arrangements between employer and employee . . . . [O]ur cases are clear that legislation readjusting right and burdens is not unlawful solely because it upsets otherwise settled expectations.

This Court sustained the Act of Congress which was challenged on retroactivity grounds in *Usery v. Turner Elkhorn* because it concluded that the retrospective imposition of liability was "a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor." 428 U.S. at 18. This was true even with respect to parties who were unaware at the time of the factual basis for their liability and who had relied on the prevailing state of the law. Here, by comparison, the enactment of ERISA in 1974 provided employers with unmistakable notice that they might be required to continue to fund the benefits promised by the plans to which they contributed.[15] The imposition of

[15] As the district court in this case noted, "the [pension] plan itself recognized that the employers' obligations were subject to statutory modification." 549 F.Supp. at 537. (App. B at 39a, *infra*.)

withdrawal liability on employers who terminated their participation in pension plans after the Senate Finance Committee's announcement – when it was clear that the Multiemployer Act was on the verge of adoption – was surely a "rational" allocation of economic burdens among employers involved in multiemployer pension funds.

Moreover, this Court in *Usery v. Turner Elkhorn* sharply limited the principal authority on which the Ninth Circuit relied – *Railroad Retirement Board v. Alton Railroad,* 295 U.S. 330 (1935), implying that *Alton's* holding now lacks "vitality". 428 U.S. at 19. In any event, the retroactivity found objectionable in *Alton* was the statutory creation of "gratuities" and additional payments "for services fully compensated" from employers to already separated employees who had never been promised pension benefits, much less acquired vested rights to such benefits. 295 U.S. at 349. No such narrow objective is involved here. Not only does the Multiemployer Act seek to protect vested benefits,[16] but the purpose of its limited retroactive period was to prevent its impending enactment

[16]The court of appeals also cited and relied upon *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234 (1978), in finding the Multiemployer Act's retroactivity provision to be unconstitutional. (App. A, pp. 23a-26a, *infra.*) But that case involved a Contracts Clause challenge to a state law which (1) was a new attempt at regulation apparently directed at one employer, (2) affected rights that had not vested, and (3) contained no provisions moderating the law's harsh implementation. The Multiemployer Act, on the other hand, presents no Contracts Clause issues, deals with a benefit guarantee program that had been in effect for six years, protects vested rights, and includes provisions specifically designed to moderate its retroactive impact. 29 U.S.C. §§ 1387 and 1397 (Supp. V 1981), as well as numerous other moderating provisions of general applicability. The Seventh Circuit in *Nachman, supra,* and several district courts considering challenges to the Multiemployer Act distinguished both *Alton* and *Allied* on the basis of these considerations.

from precipitating withdrawals from and financial jeopardy to multiemployer plans. That goal, besides being rational, was critical to the remedial program first established by Congress in 1974.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted,

HENRY ROSE
General Counsel

BARUCH A. FELLNER
Associate General Counsel

J. STEPHEN CAFLISCH
Special Counsel

PETER H. GOULD
TERENCE G. CRAIG
DAVID F. POWER
Attorneys

PENSION BENEFIT GUARANTY CORPORATION
2020 K Street, N.W.
Washington, D.C. 20006
(202) 254-3010

OF COUNSEL:

NATHAN LEWIN
Miller, Cassidy, Larroca & Lewin
2555 M Street, N.W., Suite 500
Washington, D.C. 20037
(202) 293-6400

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SHELTER FRAMING CORPORATION,
Plaintiff/Appellee,
and
CARPENTERS PENSION TRUST FOR SOUTHERN CALIFORNIA,
Defendant/Appellee,
v.
PENSION BENEFIT GUARANTY CORPORATION,
Applicant for Intervention/ Appellant.

No. 82-5271
D.C. No. CV 81-4457-IH

FILED
MAY 20 1983
PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

G & R ROOFING COMPANY, a California Corporation,
Plaintiff/Appellee,
and
CARPENTERS PENSION TRUST FOR SOUTHERN CALIFORNIA,
Defendant/Appellee,
v.
PENSION BENEFIT GUARANTY CORPORATION,
Applicant for Intervention/ Appellant.

No. 82-5272
D.C. No. CV 81-5551-IH

SHELTER FRAMING CORPORATION, Plaintiff/Appellee, v. CARPENTERS PENSION TRUST FOR SOUTHERN CALIFORNIA, Defendant/Appellant.	No. 82-5460 D.C. No. CV 81-4457-IH
	RECEIVED-PBGC 1983, MAY 23 PM 2:48 OFFICE OF GENERAL COUNSEL
G & R ROOFING COMPANY, Plaintiff/Appellee, v. CARPENTERS PENSION TRUST FOR SOUTHERN CALIFORNIA, Defendant/Appellant.	No. 82-5461 D.C. No. CV 81-5551-IH
G & R ROOFING COMPANY, Plaintiff/Appellant, v. CARPENTERS PENSION TRUST FOR SOUTHERN CALIFORNIA, Defendant/Appellee.	No. 82-5462 D.C. No. CV 81-5551-IH
R.A. GRAY AND CO., Plaintiff/Appellant, v. OREGON-WASHINGTON CARPENTERS-EMPLOYERS PENSION TRUST FUND AND PENSION BENEFIT GUARANTY CORPORATION, Defendants/Appellees.	No. 82-3506 D.C. No. CV 81-912-JAR **OPINION**

Argued and Submitted December 7, 1982
Decided May 20, 1983

Appeals from: The United States District Court
for the Central District of California
Hon. Irving Hill, Presiding;
and
The United States District Court
for the District of Oregon
Hon. James A. Redden, Presiding.

Before: WRIGHT, KENNEDY, and BOOCHEVER, Circuit Judges.

BOOCHEVER, Circuit Judge:

This opinion addresses the constitutionality of the retroactive application of the Multiemployer Pension Plan Amendments Act (the "Amendments Act"),[1] the subject of extensive nationwide litigation.[2] We hold that retroac-

[1]Pub. L. No. 96-364, 94 Stat. 1208 (1980) (codified at 29 U.S.C. §§ 1001a *et seq.* (Supp. V 1981).

[2]The following is a partial list of related cases: *Sibley, Lindsay & Curr, Co. v. Bakery, Confectionery & Tobacco Workers Int'l Union,* F. Supp. , No. Civ. 82-555T (W.D.N.Y. Mar. 16, 1983); *Washington Star Co. v. Int'l Typographical Union Nego. Pension Plan,* Civ. No. 82-1568 (D.D.C. Feb. 9, 1983) (mem.); *Bakersfield Concrete Constr. Inc. v. Construction Laborers Pension Trust,* No. 82-0044-WPG (C.D. Cal. Jan. 10, 1983); *Republic Indus. v. Teamsters Joint Council No. 83 of Va. Pension Fund,* Civ. No. 82-0919-A (E.D. Va. Dec. 29, 1982) (mem.); *Republic Indus., Inc. v. Central Pa. Teamsters Pension Fund,* 693 F.2d 290 (3d Cir. 1982); *Grano Steel Corp. v. Shopmen's Ironworkers Pension Plan,* No. CV 81-5862 LEW (C.D. Cal. Nov. 9, 1982); *Textile Workers Pension Fund v. Standard Dye & Finishing Co.,* 3 Empl. Ben Cas. 2129 (S.D.N.Y. 1982); *Pacific Iron & Metal Co. v. Western Conf. of Teamsters Pension Trust Fund,* No. C 82-653C (W.D. Wash. Oct. 15,

tive application of the withdrawal liability provision of the Amendments Act violates the due process rights of employers who withdrew from multiemployer pension plans before the Act became law.[3]

I. BACKGROUND

On September 26, 1980, the President signed into law the Amendments Act, amending certain provisions of the

---

1982); *Coronet Doge v. Speckmann*, No. 81-724 C(3) (E.D. Mo. Sept. 30, 1982) (mem.); *Fur Mfg. Indus. Retirement Fund v. Lazar-Wisotzky, Inc.*, 550 F. Supp. 35 (S.D.N.Y. 1982); *Victor Constr. Co. v. Construction Laborers Pension Trust*, No. 81-5144-CHH (C.D. Cal. June 25, 1982); *Terson Co. v. Pension Benefit Guar. Corp.*, 3 Empl. Ben. Cas. 2372 (N.D.Ill. 1982), (dismissed as moot, unpublished order); *Peick v. Pension Benefit Guar. Corp.*, 539 F. Supp. 1025 (N.D. Ill. 1982); *S & M Paving, Inc. v. Construction Laborers Pension Trust*, 539 F. Supp. 867 (C.D. Cal. 1982).

[3]Several appeals are consolidated for disposition by this opinion. In nos. 82-5271 and 82-5272, the Pension Benefit Guaranty Corp. appeals the district court's denial of its motion to intervene in the suit brought by Shelter Framing Corp. and G & R Roofing Co. against Carpenters Pension Trust.

Nos. 82-5460 and 82-5461 are the appeals brought by Carpenters Pension Trust from the district court's grant of summary judgment in favor of plaintiffs Shelter Framing and G & R Roofing.

No. 82-5462 is the cross-appeal brought by G & R Roofing Co. challenging, *inter alia*, the district court's refusal to declare the Multiemployer Pension Plan Amendments Act unconstitutional as a taking of property without just compensation.

All of the above appeals are from the judgments of Hon. Irving Hill, C.D. California.

In No. 82-3506, R.A. Gray & Co. appeals from the grant of summary judgment by Hon. James A. Redden, D. Oregon, in favor of defendants Oregon-Washington Carpenters-Employers Pension Trust Fund and the Pension Benefit Guaranty Corp.

Employee Retirement Income Security Act ("ERISA").[4] Under ERISA, the Pension Benefit Guaranty Corporation (the "Guaranty Corporation"), a government corporation, administers a system of termination insurance designed to protect employees whose pension plans fail or terminate with insufficient funds. The Guaranty Corporation receives no direct federal appropriations, but relies primarily on premium payments to meet its obligations to employees whose guaranteed benefits exceed the value of their plans' assets when the plans terminate. 29 U.S.C. § 1307 (Supp. V 1981).

When the Guaranty Corporation expended its own funds, it was formerly authorized by Title IV of ERISA to impose secondary liability on employers. Employers who withdrew frommultiemployer plans incurred a contingent liability. If a plan terminated, all employers who contributed to that plan during the five years immediately preceding its termination were collectively liable to the Guaranty Corporation for the amount the Guaranty Corporation expended. If termination liability arose, however, no single employer's liability could exceed thirty percent of that employer's net worth. *Id.* at §§ 1362(b)(2), 1364 (1976).

The Guaranty Corporation advised Congress that the contingent liability provisions of ERISA gave employers an incentive to withdraw from multiemployer plans, particularly when their plans were in poor financial health. Congress responded by enacting the Amendments Act, which replaced contingent liability with absolute liability upon withdrawal. Under the Amendments Act, an employer who withdraws must immediately begin to pay a

[4]Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified at 29 U.S.C. §§ 1001-1381 (1976)).

fixed and certain debt owed to the pension plan. The withdrawal liability is the employer's proportionate share of the plan's unfunded vested liability, the difference between the present value of vested benefits and the value of the plan's assets. The withdrawal liability provision was assigned a retroactive effective date of April 29, 1980. *Id.* at § 1461(e)(2)(A) (Supp. V 1981).

II. FACTS

There are no disputed issues of material fact. A 1959 trust agreement between the United Brotherhood of Carpenters and Joiners of America ("the Union") and several multiemployer associations formed the Carpenters Pension Trust for Southern California, a multiemployer pension plan which primarily covers employees in the building and construction industry. The Trust assets are managed by a board of trustees. Half of the trustees are appointed by the Union; the other half are appointed by the multiemployer associations.

Shelter Framing Corporation is a licensed construction contractor in southern California. Prior to July 1, 1980, Shelter Framing was bound by a collective bargaining agreement with the Union. The agreement obligated Shelter Framing to contribute to the trust fund for each hour worked by covered carpentry employees.

That agreement terminated on July 1, 1980. Shelter Framing and the Union attempted to reach a new agreement but failed. When their negotiations reached an impasse, Shelter Framing was no longer required to make any contributions to the trust fund on behalf of its employees. It ceased making payments on August 12, 1980.

On April 24, 1981, the trustees notified Shelter Framing that it had withdrawn from the trust within the meaning of the Amendments Act, and Shelter Framing thus owed to the trust fund withdrawal liability of $797,648.00. Shelter Framing had the option of paying the liability claim in a lump sum within 60 days, or in 40 monthly installments which, after interest, totalled $899,751.88. Shelter Framing admitted it withdrew from the trust, but refused to make any payments on the liability claim. The joint statement of stipulated facts indicates that for the period ending March 31, 1981, the withdrawal liability equals about 180 percent of the total stockholder equity in the corporation.[5]

G & R Roofing Company is a construction contractor, obligated under a collective bargaining agreement to make contributions to the Carpenters Pension Trust for each hour of covered work performed by carpentry employees. The agreement expired July 1, 1980, and the parties failed to reach a new agreement. The last pension contribution G & R made to the trust fund was for work performed through August 12, 1980. On September 2, 1981, the trustees assessed withdrawal liability against G & R for $687,387.00. G & R could pay a lump sum of that amount, or pay a total of $784,824.88 in 45 monthly payments. The stipulated facts indicate that for the fiscal year ending September 30, 1981, the withdrawal liability equals about

[5]In its brief on appeal, Shelter Framing states that the withdrawal liability now exceeds twice the net worth of the corporation and that immediate payment of the total claim is financially impossible, as it would require the complete termination of operations and sale of the corporate assets.

forty percent of the total stockholder equity in the company.[6]

On August 28, 1981, Shelter Framing filed suit against the trust, seeking to enjoin the collection of withdrawal liability on constitutional grounds. G & R filed a similar complaint against the trust on October 27, 1981. The trustees answered and counterclaimed for collection of the assessed withdrawal liability in both cases, which were consolidated before Senior District Judge Irving Hill.

On October 2, 1981, the trust's co-counsel informed the appellant Guaranty Corporation of the pending suit. The Guaranty Corporation is authorized to intervene in civil actions brought under the withdrawal liability provisions of ERISA. 29 U.S.C. § 1451(g) (Supp. V 1981). The Guaranty Corporation declined the trustees' invitation to intervene, though it said it would monitor the case. G & R sent a Notice of Service of Complaint in its action to the Guaranty Corporation on October 30, 1981.

In November, G & R and Shelter Framing filed motions for preliminary injunctions against attempts by the trustees to collect the withdrawal liability. The Guaranty Corporation learned from a G & R attorney in early November that the motions would be heard on December 7, 1981. The motion hearing was continued until January 11, 1982.

Judge Hill granted the plaintiffs' motions to enjoin further efforts by the trustees to collect withdrawal liability. On January 14, 1982, at a hearing held to set the terms of

---

[6]In its brief on appeal, G & R reiterates that if paid in a lump sum, the withdrawal liability totals forty percent of the company's net worth. If paid on a monthly basis, the annual liability would represent ninety-four percent of G & R's net income for its fiscal year 1981.

the preliminary injunctions, Judge Hill said he would enjoin the parties from arbitrating the disputed amount of withdrawal liability. The order was entered on January 20, 1982. The parties then filed cross-motions for summary judgment, accompanied by a joint statement of stipulated facts.

The Guaranty Corporation moved to intervene in the case on February 22, 1982. It sought to dissolve the injunction against arbitration between the employers and the trustees. The district court held that the Guaranty Corporation could not move for partial dissolution of the preliminary injunctions unless and until it was a party to each action, but agreed to hear the question of exhaustion of arbitration on March 22, 1982, before the hearing on the motions for summary judgment. The court denied the Guaranty Corporation's motion to intervene as untimely, and stated the parties would be prejudiced if the Guaranty Corporation were given leave to intervene. It did allow the Guaranty Corporation to participate as *amicus curiae*.

After hearing arguments, Judge Hill held that exhaustion of the administrative remedy of arbitration was not required before proceeding to the merits of the constitutional challenges, because the arbitrators could not adjudicate or develop a better record for adjudication of the constitutional claims. On cross-motions for summary judgment, the court held that the Amendments Act was unconstitutional as applied to Shelter Framing and G & R. Judgments were entered in favor of plaintiffs on April 13, 1982. The court also awarded attorney's fees to plaintiffs.[7]

[7]Judge Hill's opinion is reported at 543 F. Supp. 1234 (C.D. Cal. 1982).

After entry of judgment, the parties entered into a stipulation to allow the Guaranty Corporation to intervene for purposes of appeal. The Guaranty Corporation chose not to intervene, and the court denied the intervention on the ground that it lacked jurisdiction to reverse by stipulation its prior order denying intervention. The Guaranty Corporation appeals the district court's prior denial of the motion to intervene at trial and also seeks to appeal the court's failure to require arbitration before ruling on the constitutional claims.

R.A. Gray & Co. is an employer who was obligated under a collective bargaining agreement with the Oregon State Council of Carpenters to contribute to the Oregon-Washington Carpenters-Employers Pension Trust Fund. The parties did not renew the agreement when it expired on May 31, 1980. On July 24, 1981, the trustees notified R.A. Gray that it had withdrawn from the multiemployer plan as of June 1, 1980 and assessed withdrawal liability in the amount of $201,359.00.

R.A. Gray sued for declaratory and injunctive relief in September 1981, challenging the constitutionality of the Amendments Act on grounds similar to those considered in Judge Hill's court. Judge Redden denied R.A. Gray's request for a preliminary injunction, and granted summary judgment for the trust.

III. THRESHOLD ISSUES

Before we reach the issue of the constitutionality of the retroactive application of the Amendments Act, we must consider two threshold issues raised by the Guaranty Corporation in appeal numbers 82-5271 and 82-5272. The first is whether the district court abused its discretion in deny-

ing the Guaranty Corporation's motion to intervene. The second is whether parties challenging the constitutionality of the Amendments Act must exhaust the administrative remedy of arbitration before adjudication of the constitutional claims.

A. INTERVENTION

Federal Rule of Civil Procedure 24(a) allows intervention as of right upon timely application when a federal statute confers an unconditional right to intervene, or when the applicant claims an interest relating to the subject of the action and disposition may impair or impede its ability to protect that interest. A district court's ruling that an intervention motion is untimely will not be overturned unless the court abused its discretion. *Petrol Stops Northwest v. Continental Oil Co.*, 647 F.2d 1005, 1009 (9th Cir.), *cert. denied*, 454 U.S. 1098 (1981).

The district court did not abuse its discretion in denying the Guaranty Corporation's motion. The court stated that the motion was untimely and that the Guaranty Corporation had forfeited its right of intervention by permitting the matter to progress as far as it had without attempting to intervene.

We weigh three factors to determine timeliness: the stage of the proceedings at which an applicant seeks to interve, the reason for and length of the delay, and whether the parties would suffer prejudice. *Alaniz v. Tillie Lewis Foods*, 572 F.2d 657, 659 (9th Cir.) (per curiam), *cert. denied*, 439 U.S. 837 (1978). Our focus is on the date the Guaranty Corporation should have been aware its interest would not be protected adequately by the parties, not the date it learned of the litigation. *See id.; Legal Aid Society*

of Alameda Co. v. Dunlop, 618 F.2d 48, 50 (9th Cir. 1980) (per curiam).

The Guaranty Corporation argues that it does not have the staff to intervene in all actions challenging the constitutionality of the Amendments Act (now over 100 nationwide) and must monitor cases until it decides intervention is required to protect its interests. In the cases here on appeal, it claims that it was not aware until mid- to late January that the Carpenters Pension Trust would not take the position favored by the Guaranty Corporation, requiring arbitration as an administrative remedy before adjudication of the constitutional claims. It "suspected" that its interests might not adequately be represented on January 15, 1982, when it learned that the trust's counsel did not oppose an injunction against arbitration. The suspicion "turned to alarm" when the Guaranty Corporation received a copy of the court's injunction on January 25, 1982.

We are not convinced by the Guaranty Corporation's claim that it did not suspect that the trust would not protect the Guaranty Corporation's interests until late January. The Guaranty Corporation knew in early November that preliminary injunction motions had been filed. It never inquired what position the trust or other parties would take on the arbitration issue. The trust never indicated to the Guaranty Corporation it would ask for arbitration; in fact, the trust's counsel stated "no one could have had a reasonable basis for assuming" that the trust would seek arbitration.

In *Alaniz,* appellants sought intervention seventeen days after a consent decree became effective. They argued that they did not know the settlement decree would be to their detriment. The court affirmed denial of their motion,

stating "surely they knew the risks. To protect their interests, appellants should have joined the negotiations before the suit was settled." 572 F.2d at 659. The Guaranty Corporation even more clearly knew the risks in these cases. Had it monitored the cases, as it told the trust it would, it could not reasonably have assumed that the trust would demand arbitration.

Even if the Guaranty Corporation is not held to have known the risks, and did not learn its interests were jeopardized until January 15, it still fails the timeliness test. It did not move to intervene until February 22, more than one month after its original "suspicion" arose. *See NAACP v. New York*, 413 U.S. 345, 367 (1973) (delay of two and one-half weeks was untimely where motion papers indicated a strong likelihood that the parties would enter into a consent decree). Since prompt adjudication of the employers' claims was in the litigants' interest, they would be prejudiced by permitting this inexcusably late intervention motion.

Finally, the district court allowed the Guaranty Corporation to argue as *amicus curiae* on the issue of arbitration, thus the Guaranty Corporation had fair opportunity to present its views to the court. In view of that opportunity, and the Guaranty Corporation's untimely action, we hold that the district court did not abuse its discretion.

B. ARBITRATION

The Guaranty Corporation argues that the district court lacked jurisdiction and, in any event, should not have addressed the constitutional issues before requiring arbitration because arbitration of withdrawal liability is statutorily mandated and, if not mandatory, should be required as

a matter of policy. In view of our decision that the district court did not err in denying the Guaranty Corporation's motion to intervene, the Corporation has no standing to raise the arbitration issue. Nevertheless, we must reach that issue at least to determine whether arbitration of withdrawal liability was mandated, before the district court could address the constitutionality of the withdrawal provisions.

Section 4221(a)(1) of ERISA does provide for resolution of disputes through arbitration proceedings. 29 U.S.C. § 1401(a)(1) (Supp. V 1981). The statute is limited, however, to those disputes involving a determination made under section 4201 through 4219 of ERISA. Those sections refer to the establishment, computation and collection of withdrawal liability. 29 U.S.C. at §§ 1381-1399 (Supp. V 1981). Thus the arbitration requirement does not apply where the constitutionality of the statute, not the establishment or amount of withdrawal liability, is at issue. The district court correctly found no mandatory arbitration requirement for determination of constitutional issues.

Where there is no statutory requirement of exhaustion, the court should balance the agency's interests in applying its expertise, making a proper record, and maintaining an efficient, independent administrative system with the interests of private parties in finding adequate redress. *Montgomery v. Rumsfield,* 572 F.2d 250, 253 (9th Cir. 1978). We recognize the importance of the exhaustion doctrine and its underlying policy of judicial efficiency. *See Myers v. Bethlehem Shipbuilding Corp.,* 303 U.S. 41, 50-51 (1938). Upon weighing the relevant factors, however, we conclude that arbitration in this case would be of no value to the parties or the court. The Guaranty Corporation's

expertise relates only to how the Amendments Act is to be applied and administered; it cannot aid the court in addressing the naked constitutional law issue raised by the employers in their direct attack upon the entire statutory scheme. Arbitration would not eliminate the assessed withdrawal liability. There is only a remote possibility that liability would be reduced materially. Arbitration would neither develop a better record for adjudication of the constitutional issues nor eliminate the need to consider the constitutional challenge.

Our conclusion is consistent with the decisions of other courts that have already considered the adequacy of arbitration as an administrative remedy in the face of a constitutional attack on the Amendments Act. *See Republic Industries, Inc. v. Central Pennsylvania Teamsters Pension Fund,* 693 F.2d 290 (3d Cir. 1982) (it would be futile to compel exhaustion where plaintiff mounted a facial challenge to the Amendments Act); *Peick v. Pension Benefit Guaranty Corp.*, 539 F. Supp. 1025, 1038 & n.27 (N.D. Ill. 1982) (where plaintiffs brought a facial challenge to the statute, the lack of a factual record and the possibility of an exemption did not bar action on ripeness grounds).[8]

IV. RETROACTIVITY

Having concluded that the district court had jurisdiction to consider the constitutional challenge to the Amendments Act, we now turn to the issue of whether retroactive

[8]We agree with the court in *Republic* that where the exhaustion doctrine is inapplicable, we need not consider the trust's argument that this case falls within one of the exceptions to the exhaustion doctrine. 693 F.2d at 298.

application of the Act violates due process. We have reviewed opinions on both sides of the issue.[9] We recognize that the Amendments Act comes to the courts with a presumption of constitutionality and that the burden is on the plaintiffs to establish that Congress acted in an arbitrary and irrational way. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). We also recognize that "[t]he due process clause does not make unconstitutional every law with retroactive effect" and that "[o]nly when such retroactive effects are so wholly unexpected and disruptive that harsh and oppressive consequences follow is the constitutional limitation exceeded." *Hazelwood Chronic & Convalescent Hospitals, Inc. v. Weinberger*, 543 F.2d 703, 708 (9th Cir. 1976), *vacated on other grounds*, 430 U.S. 952 (1977). We find, however, that the retroactive burden imposed by the Act on plaintiffs-employers is constitutionally invalid.

An analysis of the retroactivity issue must begin with a review of congressional goals in enacting the Amendments Act and a brief legislative history of the Act.[10] As enacted in 1974, ERISA provided that before January 1, 1978, payment of guaranteed benefits earned by employees in multiemployer plans was made at the discretion of the Guaranty Corporation. 29 U.S.C. § 1381(c) (1976). On

[9]In addition to the well-reasoned opinions of Judges Hill and Redden, a thorough discussion of the issue may be found in *Peick v. Pension Benefit Guar. Corp.*, 539 F. Supp. 1025 (N.D. Ill. 1982). Judge Getzendanner concludes in *Peick* that although "this is an extremely close call", *id.* at 1056, retroactive aplication of the amendments Act is constitutional. *But see Sibley, Lindsay & Curr, Co. v. Bakery, Confectionery and Tobacco Workers Int'l Union*, F. Supp. No. Civ. 82-555T (W.D.N.Y. Mar. 16, 1983), in which the court *held that retroactive application of the Act is unconstitutional.*

[10]For an extensive discussion of the legislative history of the Amendments Act, *see Peick*, 539 F.2d at 1029-34.

January 1, 1978, payment of guaranteed benefits for terminated multiemployer plans was to become mandatory. In 1977, Congress expressed concern about the effect, particularly the cost, of implementing the mandatory guarantee. It therefore delayed the effective date of the mandatory guarantee program and ordered the Guaranty Corporation to submit a report on multiemployer plans. *See Peick v. Pension Benefit Guaranty Corp.*, 539 F. Supp. 1025, 1030-31 (N.D. Ill. 1982). Over the course of the next few years, while Congress debated the issue of multiemployer plan termination, the effective date of the mandatory guarantee program was extended three more times in anticipation of legislative changes in ERISA's multiemployer plan provisions. *Id.* at 1032-33.

The Guaranty Corporation's study, submitted to Congress on July 1, 1978, reported that ERISA might encourage termination of multiemployer pension plans. The Corporation suggested that since mandatory termination insurance would protect virtually all vested benefits in multiemployer plans, employers, whose liability was contingent and limited to thirty percent of their net worth, might choose to terminate their plans. Active employees might also desire termination where a high proportion of pension contributions was being used for retirees' benefits. The Guaranty Corporation feared that these combined economic advantages might act as an incentive to plan termination. *Id.* at 1031-32 (quoting Pension Benefit Guaranty Corporation, Multiemployer Study Required by P.L. 95-214, at 23-24 (1978)). On February 27, 1979, the Corporation submitted a legislative proposal advocating certain changes in ERISA designed to diminish that incentive. Legislation was formally introduced on May 3, 1979.

The 1979 legislative proposal eventually became the Amendments Act. When the bill was first introduced, the withdrawal liability rules were given an effective date of February 27, 1979, the date the proposal was first submitted by the Guaranty Corporation. In June 1980, the Senate Finance Committee determined that the February 27, 1979 date was unnecessarily harsh, and changed it to April 29, 1980, the date eventually enacted into law. *Id.* at 1053. The Act was finally signed into law on September 26, 1980.

In determining the validity of the retroactive provision, Judge Hill and Judge Redden followed the analysis used by the Seventh Circuit in *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 592 F.2d 947 (7th Cir. 1979), *aff'd*, 446 U.S. 359, *reh'g denied*, 448 U.S. 908 (1980). The issue presented in *Nachman* was whether the retrospective imposition of employer liability authorized by ERISA superseded a liability exclusion clause included in the single employer's pension plan. The court examined four factors for the purpose of determining whether the employer was subject to liability. The factors were: (1) the reliance interests of the parties affected; (2) whether impairment of the private interest is effected in an area previously subjected to regulatory control; (3) the equities of imposing the legislative burdens; and (4) the inclusion of statutory provisions designed to limit and moderate the impact of the burdens. 592 F.2d at 960. Applying that test the *Nachman* court held that the employer was liable. Although the case did not involve a retroactive effective date, we agree that the *Nachman* test applies here, and we shall discuss each of the factors as applied to the retroactive imposition of the withdrawal liability required by the Amendments Act.

A. RELIANCE INTERESTS

This factor weighs in favor of Shelter Framing, G & R, and R.A. Gray ("the employers"). They all withdrew from their multiemployer plans before the date the Amendments Act was enacted. It was not certain at the time they withdrew that the Amendments Act would be enacted and would have a retroactive effect. We reject the argument that the employers should have known of the status of the pending legislation and should have known that the Act, when passed, would have a retroactive effect. *See Peick,* 539 F. Supp. at 1053. This much-debated legislation went through a variety of forms before its passage. The bill's original effective date was changed as late as June 1980. Congress also extended the effective date of the mandatory guarantee program four times while waiting for the Amendments Act to pass. It would have been impossible for anyone to predict with accuracy the final outcome of the legislative process. The employers therefore relied reasonably upon their collective bargaining agreements with the Unions and the contingent withdrawal liability provisions of ERISA.

The law here operates to the severe detriment of the employers, and we believe their reliance on the prior law to be the most relevant reliance interest to be considered. Yet we recognize as well that *Nachman* suggests consideration should be given to the reliance interests of other parties.

Employees expecting benefits under their multiemployer plans have an interest in the financial health of their plans. Their interest, however, goes more toward the solvency of the multiemployer plan as a whole than toward the individual contributions of a single employer, and this does not necessarily translate into a justified reliance interest in any single employer's withdrawal liability. There is no

reason to believe that employee significantly relied for the financial health of the multiemployer plans on the increased termination liability imposed by the Amendments Act on those employers who withdrew between the effective date of the Act and the date of enactment. For example, the withdrawal liability imposed on the employers here is relatively insignificant in terms of the plans' total unfunded vested benefits liability. Judge Hill found that the employers' failure to pay their withdrawal liability caused Carpenters Pension Trust no clear or immediate harm. The trust fund and covered employees have not relied heavily on these employers' contributions, and thus their interests do not outweigh the reliance interests of the employers.

The *Nachman* court put greater emphasis on employee interest, but that case is different. *Nachman* involved a single employer pension plan, thus the employees had a far greater interest in the contributions of one employer. Furthermore, the employer in *Nachman* terminated after the enactment of ERISA. The employers in these cases, having withdrawn before enactment of the Amendments Act, were not given the opportunity to make such an educated choice. There were alternative actions the employers might have taken to avoid withdrawal liability had they known about their exposure to withdrawal liability under the Amendments Act. For example, they might have renewed their collective bargaining agreements and continued to contribute to the plans. They might have gone out of business completely, or sold their assets to a company which participated in the plan. We conclude that the reliance factor weighs against the retroactive application of the statute.

B. PRIOR REGULATION

This second factor, whether the interests impaired by the retroactive application of the Act were previously subject to regulation, is another facet of reliance. Where parties engage in a regulated business, they should reasonably anticipate some modification of the scope of regulation. In *Veix v. Sixth Ward Building & Loan Association,* 310 U.S. 32 (1940), the Supreme Court emphasized the importance of prior state regulation in upholding a New Jersey law which was more restrictive than its predecessor. The plaintiff purchased shares in a savings and loan when state law allowed for a later turnback or redemption of those shares. After his purchase, the law was changed to restrict the conditions of redemption. The funds from which defendant was allowed to redeem shares were defined more narrowly, and early redeemers were given less priority on their turned-back shares. The Court stated:

> It was while statutory requirements were in effect that petitioner purchased his shares. When he purchased into an enterprise already regulated in the particular to which he now objects, he purchased subject to further legislation upon the same topic.

Veix, 310 U.S. at 38 (footnote omitted).

Pension plans have, of course, been subject to regulation at least since the passage of ERISA in 1974. Subjecting parties to some risk of further regulation should not, however, require them to anticipate drastic legislative changes which extract a heavy fine for action taken before the changes win congressional approval. Parties can reasonably be expected to adjust their behavior in accordance with legislation which clarifies or modifies existing restrictions. In *Federal Housing Administration v. The*

Darlington, Inc., 358 U.S. 84 (1958), the Supreme Court upheld an amendment to regulations regarding rental of property financed by federally insured loans. The Court said that in amending the law, Congress was articulating a construction of the law which it had already accepted under the original language. Thus the amendment was a clarification of, not a drastic change in, the existing law. In contrast, the retroactive application of the Amendments Act goes far beyond a clarification or modest modification of ERISA. The Act imposes a much heavier burden on withdrawing employers than had been imposed by ERISA. The fact of prior regulation in the pension plan area weighs in favor of retroactive application, but does not away us from our conclusion that such application of the Act impaired the employers' reliance interests to an unduly harsh degree.

C. EQUITIES

Here we confront the difficult task of weighing the individual burdens on the withdrawing employers against the policies Congress hoped to further by establishing a retroactive effective date for the Amendments Act. We approach our task sensitive to the historical development of judicial review of economic legislation.

The Supreme Court expressed its disfavor of retrospective legislation in *Railroad Retirement Board v. Alton Railroad*, 295 U.S. 330 (1935). At issue in *Alton* was a federal law requiring the railroads to establish a pension fund which would cover current employees and those who had worked for the railroad within the year before the law was adopted. The law also provided certain benefits to employees who left the railroad service and later returned. The Court held that the statute violated the due process

clause, because it arbitrarily imposed additional liabilities on employers for transactions long ago closed and fully compensated. 295 U.S. at 353-54.

The reluctance of the Court in *Alton* to defer to legislative judgment is generally associated with the era of the Court's vigorous protection of economic interests on constitutional grounds. The decision, however, has never expressly been overruled. It was narrowed by the Court in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). In that case, Congress passed a law providing benefits to coal mine workers who suffered from black lung disease. Amendments to the statute increased miners' benefits, which were paid in part by coal mine operators. The operators challenged the retrospective effect of the statute, arguing that it violated their due process rights because it required the operators to pay benefits to miners who had left their employ before the effective date of the act. The Court held the act valid as a rational means by which to spread the costs of mine workers' disabilities.[11]

Turner Elkhorn Mining suggested that the Supreme Court favors great deference to Congress' judgment in allocating economic benefits and burdens, even where legislative schemes impose significant hardships on some individuals. The more recent case of *Allied Structural*

[11]A similar result was reached by this court in *Todd Shipyards Corp. v. Witthuhn*, 596 F.2d 899 (9th Cir. 1979). There the court held that a provision of the Longshoremen's and Harbor Workers' Compensation Act which allows for payment of death benefits if an employee who sustains permanent total disability due to injury thereafter dies from causes other than the injury applies to claims based upon a death which occurred after the effective date of the statute, even though the injury occurred before the effective date. The court rejected the argument that the statute violated due process, finding that the survivors' rights in death benefits first vested upon the employees' death, after the effective date of the statute. *Id.* at 902.

Steel Co. v. Spannaus, 438 U.S. 234 (1978), restricts the degree of that deference. *Allied Structural Steel* involved a Minnesota law which provided protection to employees covered under private pension plans. Under plaintiff-employer's plan, certain employees did not have vested rights until they had worked fifteen years for the employer. Under the statute, employees needed only ten years of service to qualify as pension obligees. The Court held that the statute violated the contract clause because, *inter alia*, the law "worked a severe, permanent, and immediate change" in the contractual relationships, it worked unfairly against those who voluntarily had established pension plans, and it regulated a field not previously regulated by the state. 438 U.S. at 250.[12]

This case shares with *Alton* and *Allied Structural Steel* a harsh burden imposed upon the employers for completed transactions. The effective date of the Act was arbitrarily fixed. The employers are required now, after making the measured decision to withdraw from their plans, to pay a sum that seriously threatens their solvency, without a specific showing of proportionate need on the part of the pension trust funds.

---

[12]The Supreme Court has not expressly stated that the contract and due process clauses impose identical restraints on the legislative impairment of contracts. Considerations similar to those examined in contract clause analysis, however, may apply to the federal government through the due process clause. We have in the past confirmed the concurrent scope of the protection afforded by these provisions:

> [T]he Fifth Amendment's due process clause provides essentially the same restraint against federal impairment of the obligation of contracts [as the contract clause].

Northwestern Nat'l. Life Ins. Co. v. Tahoe Regional Planning Agency, 632 F.2d 104, 106 (9th Cir. 1980); *see also Todd Shipyards Corp. v. Witthuhn*, 596 F.2d 899, 904 (9th Cir. 1979) (Sneed, J., concurring).

This burden on the employers lacks the justification present in *Turner Elkhorn Mining*. There the Supreme Court found

> that the imposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor — the operators and the coal consumers.

Turner Elkhorn Mining, 428 U.S. at 18. In contrast, here there were no hidden risks, such as those of black lung disease, constituting a rational basis to alter drastically the expected economic balance.

In distinguishing *Allied Structural Steel* from the facts in *Nachman*, the Seventh Circuit emphasized that Title IV of ERISA "represent[s] a rational attempt to impose liability only to the extent necessary to achieve the legislative purpose." 592 F.2d at 962. The same cannot be said of the retroactive application of the Amendments Act. The withdrawal liability imposed on the employers for their pre-Amendments Act termination may well be disproportionate to the specific needs of the pension trust funds. Other legislative programs would have served the same purpose of ensuring financially healthy multiemployer plans. Those withdrawing prior to enactment of the Amendments Act were still contingently liable under ERISA. Additionally, employers could have been required to post a bond upon their withdrawal, or the withdrawal liability provisions of ERISA, while still contingent, could have been modified to provide a more secure "safety net" in the event a particular pension plan failed. Keeping in mind that we refer only to those employers who withdrew in the brief period between April

29, 1980 and September 26, 1980, and balancing the benefits to the multiemployer plans of imposing liability over and above the contingent liability already lawfully imposed by ERISA against the burden on the employers, we conclude that the equities weigh against retroactive application of the Amendments Act.

D. MODERATING PROVISIONS

The absence of moderating provisions in the Amendments Act as applied retroactively is the most significant distinction between this case and *Nachman*, 592 F.2d at 962-63. The Amendments Act does not contain three major moderating provisons of ERISA: the contingent nature of the liability, the cap on payments placed at thirty percent of an employer's net worth, and the calculation of liability based on only the amount guaranteed by the Guaranty Corporation, not the full value of the employees' vested benefits. The Amendments Act nevertheless offers several mitigating provisions of its own. A mandatory "de minimis" exemption excuses in general all assessments under $50,000.00. 29 U.S.C. § 1389(a) (Supp. V 1981). A higher exemption is available if the trustees opt for it in their discretion. *Id.* at § 1389(b) (Supp. V 1981). Withdrawal liability is payable over time according to a schedule prescribed by statute. *Id.* at § 1399(c)(1) (Supp. V 1981). Liability is limited to the first twenty annual payments if more than twenty years are needed to amortize an employer's withdrawal liability. *Id.* at § 1399(c)(1)(B) (Supp. V 1981). Liability is reduced if the employer withdraws because it has liquidated or dissolved its business. *Id.* at § 1405 (Supp. V 1981).

We find little, if any, comfort for the employers in these provisions. The de minimis exemption may well be inap-

plicable, as it is here, and the further exemption can only be exercised by the trustees. The employers could not with certainty predict the form and passage of the Act, thus they could not choose to go out of business, or sell to a buyer in the industry. The twenty-year restriction, which does little to mitigate a large withdrawal liability, is inapplicable. The assessment of liability in monthly installments, as opposed to a lump sum payment, fails to mitigate the burden where the monthly payments would take an unreasonable amount of the employers' income. Finally, it is not clear, as Carpenters Pension Trust claims, that if the employers rejoin the plan, their liability would be abated or eliminated. Even assuming that the employers could rejoin their plans, pursuant to new collective bargaining agreements, the Guaranty Corporation has not yet adopted regulations regarding the possible reduction or waiver of liability where a former participant rejoins a plan.

We hold that retroactive application of the Amendments Act violated the employers' rights to due process as guaranteed by the fifth amendment. We take special care to note that our holding applies only to those employers who withdrew before the enactment of the Amendments Act, but after the effective date of the Act. We express no opinion as to the constitutionality of the imposition of liability on employers who withdrew after September 26, 1980.

Since we find that the retroactive application of the Act is constitutionally invalid, we need not reach the issue of whether the imposition of liability constitutes a taking for which compensation is required, or any of the other numerous issues raised by the parties other than the award of attorney's fees.

V. ATTORNEY'S FEES

The district court in *Shelter Framing* and related cases awarded attorney's fees under 29 U.S.C. § 1451(e) (Supp. V 1981).[13] The Act provides for award of fees to a party "who is adversely affedected by the act or omission" of another party with respect to a multiemployer plan. The trust contends that it did nothing other than carry out the obligations imposed by the Amendments Act, thus it did not act or omit to act under its construction of the statute. The statute, however, contains no language which would restrict the terms "act or omission of any party" to conduct which is in violation of the provisions of the statute. We therefore hold that the language of the statute is broad enough to include an award for vindication of constitutional rights. The act of imposing substantial withdrawal liability upon the employers adversely affected them. Since Shelter Framing and G & R were clearly the "prevailing parties", they were entitled to attorney's fees in the discretion of the district court. *See Hummell v. S.E. Rykoff & Co.*, 634 F.2d 446, 452-53 (9th Cir. 1980). We

---

[13]The relevant sections read in pertinent part:

> (a) Persons entitled to maintain actions. (1) A plan fiduciary, employer, plan participant, or beneficiary, who is adversely affected by the act or omission of any party under this subtitle with respect to a multiemployer plan, or an employee organization which represents such a plan participant or beneficiary for purposes of collective bargaining, may bring an action for appropriate legal or equitable relief, or both.

29 U.S.C. § 1451(a)(Supp. V 1981).

> (e) Costs and expenses. In any action under this section, the court may award all or a portion of the costs and expenses incurred in connection with such action, including reasonable attorney's fees, to the prevailing party.

29 U.S.C. § 1451(e) (Supp. V 1981).

find no abuse of discretion and affirm the award. We also grant attorney's fees on appeal under 29 U.S.C. § 1451(e) to Shelter Framing and G & R, who requested such fees.[14]

The judgments in appeal numbers 82-5271, 82-5272, 82-5460 and 82-5461 are AFFIRMED. Our affirmance in appeal number 82-5461 disposes of the issues raised in cross-appeal number 82-5462, and we do not reach the contentions therein. The judgment in appeal number 82-3506 is REVERSED.[15]

[14]Appellant R.A. Gray made no request for attorney's fees on appeal. *See* 9th Cir. R. 13(b)(1)(E).

[15]Attorneys for G & R moved this court for sanctions against the Guaranty Corporation for alleged violation of Fed. R. App. P. 28(j) and 9th Cir. R. 13(g). We find no impropriety and deny the motion.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

R.A. GRAY & CO., Plaintiff,	)	Civil No. 81-912-RE
	)	OPINION
v.	)	
OREGON-WASHINGTON CARPENTERS-EMPLOYERS PENSION TRUST FUND and PENSION BENEFIT GUARANTY CORPORATION, Defendants.	)	

Thomas M. Triplett
Mildred J. Carmack
Schwabe, Williamson Wyatt,
Moore & Roberts
1200 Standard Plaza
1100 S. W. Sixth Avenue
Portland, Oregon 97204
Attorneys for Plaintiff.

MLGC-2827

William B. Crow
Miller, Nash, Yerke,
Wiener & Hager
900 S. W. Fifth Avenue
Portland, Oregon 97204

David S. Paull
Bailey & Paull
5441 S. W. Macadam Avenue
Portland, Oregon 97201

Attorneys for Defendant
Oregon-Washington Carpenters-
Employers Pension Trust Fund

Henry Rose, General Counsel
Baruch A. Fellner, Associate General Counsel
J. Stephen Caflisch, Special Counsel
David F. Power, Attorney
Pension Benefit Guaranty Corporation
Office of the General Counsel
2020 K Street, N.W.
Washington, D.C. 20006

Attorneys for Defendant
Pension Benefit Guaranty Corporation.

REDDEN, JUDGE:

Plaintiff R.A. Gray & Co. (Gray) brought this action to obtain a declaration that certain provisions of the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), Pub. L. No. 96-364, 94 Stat. 1208, *et seq.* (September 26, 1980), 29 U.S.C.A. § 1001, *et seq.* (Supp. 1981) are unconstitutional and unenforceable. Gray contends that those provisions of the MPPAA which create withdrawal liability are unconstitutional as applied to employers who withdrew from a multiemployer pension plan prior to the date of the enactment of the MPPAA. Gray also attacks the arbitration provisions of the MPPAA. Gray moves for summary judgment. The defendants, the Oregon Washington Carpenters-Employers Pension Plan Trust Fund (Trust) and the Pension Benefit Guaranty Corporation (PBGC), contend that the MPPAA is valid and enforceable and they move for summary judgment in their favor. I conclude the statute is valid. I grant defendants' motions for summary judgment and deny Gray's.

PARTIES

The Trust is administered pursuant to the Revised Pension Plan for the Oregon Washington Carpenters-Employers Pension Trust Fund (Plan). The Plan is a multiemployer defined benefit pension plan within the meaning of the Employment Retirement Income Security Act of 1974 (ERISA), *as amended by* the MPPAA, 29 U.S.C.A. § 1301(a)(3) (Supp. 1981). The Plan is a building and construction plan within the meaning of ERISA, 29 U.S.C.A. § 1383(b). The Plan is administered by the Board of Trustees (Trustees).

Gray is an employer within the meaning of Title IV of ERISA. Pursuant to successive collective bargaining agreements with the Oregon State Counsel of Carpenters (Union), Gray made contributions to the Trust to finance the pension benefits provided by the Plan.

The PBGC is a United States Corporation which was created by ERISA. It is responsible for administration and enforcement of ERISA, as amended by the MPPAA, 29 U.S.C.A. §§ 1301-1461, 1303(e)(1) (Supp. 1981).

EVENTS

In February 1980 Gray notified the Union that Gray was terminating its collective bargaining agreement with the Union. In July 1981, the Trustees notified Gray that Gray had completely withdrawn from the Plan as of June 1, 1980 and had a withdrawal liability in the amount of $201,359. The Trustees demanded payment of the withdrawal liability in accordance with a specified quarterly schedule. Gray filed this action on September 29, 1981. Gray also moved for a preliminary injunction to restrain the Trust from taking further steps to collect the withdrawal liability. I denied the motion.

In response to Gray's request that the Trustees review their determinations with regard to Gray's withdrawal liability, the Trustees issued a "Decision on Review." The Decision on Review made several findings that the Trustees had previously accurately determined: (1) the method for allocating the unfunded vested benefits to Gray, (2) the amount of the Plan's unfunded vested benefits, (3) the schedule of payments offered to Gray, and (4) the date of Gray's complete withdrawal.

Following receipt of the Decision on Review, Gray could have initiated arbitration of disputes with the Trustees. Gray however, informed the court on February 16, 1982 that it accepted and adopted the Trustees' findings and further stated that it waived the right to arbitration under the MPPAA.

None of the parties disputes the foregoing facts.

BACKGROUND

On September 26, 1980, the MPPAA was signed into law. The MPPAA changed the law governing an employer's withdrawal from pensions plans. Under the MPPAA, withdrawal from a multiemployer plan gives rise to a fixed debt owed to the pension plan. The withdrawing employer becomes liable for a proportionate share of the pension plan's unfunded vested liability. The trustees of the pension plan have the duty to calculate and collect the liability. Disputes between an employer and the trustees over the amount or method of assessment go first to arbitration. Although the MPPAA became law on September 26, 1980, the MPPAA expressly provides that the provisions governing withdrawal liability are retroactively applied to withdrawals occurring on or after April 29, 1980. Therefore, an employer withdrawing before September

26, 1980 but after April 29, 1980 is bound by the withdrawal liability provisions of the MPPAA.

GRAY'S CONTENTIONS

Gray contends that the retroactivity of the MPPAA withdrawal provisions is arbitrary, irrational and violates the due process clause of the fifth amendment to the United States Constitution as well as Gray's "rights arising out of contract." Gray also contends that the MPPAA violates the equal protection clause of the fifth amendment to the United States Constitution by irrationally distinguishing between employers who contribute to single-employer plans and those who contribute to multiemployer plans and discriminating against the latter. Gray contends that the MPPAA also violates Article I, Section 9, Clause 3 of the United States Constitution which prohibits the enactment of *ex post facto* laws. Finally, Gray contends that the "compulsory arbitration" provisions of the MPPAA impermissibly curtail the seventh amendment right to a jury trial and violate due process.

The defendants do not dispute Gray's contention that the statute is retroactive.

DUE PROCESS AND RETROACTIVITY

The Plaintiff's burden on this issue is set out in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976).

> It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.

428 U.S. at 15.

In *Nachman Corp. v. Pension Ben. Guaranty Corp.*, 592 F.2d 947 (7th Cir. 1979), *aff'd*, 446 U.S. 359 (1980) *(Nachman)*, the Seventh Circuit held that the retroactive application of Title IV of ERISA did not violate due process. *Nachman* surveyed the precedents and synthesized them in a four-factor analysis of the burden imposed by the challenged legislation. 592 F.2d at 958-60. The four factors are: (1) the reliance interest of the affected parties, (2) whether the interest impaired is in an area previously subjected to regulatory control, (3) the equities of the legislative burdens, and (4) statutory provisions which limit and moderate the impact of the burdens imposed. *Id.* at 960. The four factors described the burden imposed. In evaluating the statute, the court compares the problem being remedied with the burdens imposed to determine if the legislative remedy is irrational and therefore violates due process. *See Id.*

The parties point to three decisions on the issue which is before me. Plaintiffs point to the two decisions of Judge Hill in *Shelter Framing Corp. v. Carpenters Pension Trust for Southern California*, Civil No. 81-4457-IH (D.C. Cal. 1982), and *G & R Roofing Co. v. Carpenters Pension Trust for Southern California*, Civil No. 81-5551-IH (D.C. Cal. 1982), in which he held that the retroactive application of the withdrawal provisions was impermissible. Defendant PBGC points to the decision of Judge Getzendanner in *Peick v. PBGC*, Civil No. 81 c 1911 (N.D. Ill. May 14, 1982), in which she ruled that the retroactive provision of the MPPAA survives a facial attack on due process, equal protection, seventh amendment and contractual impairment grounds.

Both the decisions of Judges Hill and Getzendanner and

the briefs of the parties use the four factor analysis of *Nachman*. I agree that it is the appropriate approach.

A. Problem to be Remedied

As originally enacted in 1974, ERISA provided that before January 1, 1978, payment of guaranteed benefits for terminated multiemployer plans was discretionary, and on January 1, 1978, payment of guaranteed benefits for such plans was to become mandatory. 29 U.S.C. § 1831(c). In 1977 Congress became concerned about the effect of implementing the mandatory guarantees, delayed the date for implementation and ordered the PBGC to submit a report on multiemployer plans. *Peick v. PBGC* at 5-6.

The PBGC report, entitled "Pension Benefit Guaranty Corporation, Multiemployer Study, Required by P.L. 95-214," was submitted on July 1, 1978. It contained the following findings, which I take, as quoted, from *Peick v. PBGC* at 6:

> 1. There were about two thousand covered multiemployer pension plans with approximately eight million participants. Pension Benefit Guaranty Corporation, Multiemployer Study Required by P.L. 95-214, at 1, 20 (1978) (hereafter cited as PBGC Report).
>
> 2. About ten per cent of these plans were experiencing financial difficulties that could result in plan termination before 1988. These plans had about 1.3 million participants. *Id.* at 1, 138.
>
> 3. If all of these plans were to terminate, it could cost the insurance system about $4.8 billion to fund all plan benefits then covered by Title IV's guarantee. The annual premium

needed to fund this liability would be unacceptably high. *Id.* at 2, 16, 139.

4. Limiting consideration to only those covered multiemployer pension plans which were experiencing sufficiently serious financial difficulties that it was likely they would become insolvent before 1988, the cost to the insurance system to fund all guaranteed plan benefits could be approximately $560 million. The annual per capita premium needed to fund this liability could rise from fifty cents to as much as nine dollars. *Id.* at 2, 16, 140.

The PBGC report also found that ERISA and particularly Title IV of ERISA, might encourage termination of multiemployer pension plans. PBGC Report at 23-4.

The House Education and Labor Committee concurred in the views of the PBGC:

> [T]he corporation's report clearly demonstrates that: (1) the magnitude of the risk and the potential exposure of the system are intolerably high; and (2) existing law and particularly the plan termination insurance provisions are inadequate to assure financially sound multiemployer plans, may accelerate declines and further weaken and hasten the termination of financially weak plans. The committee agrees with the conclusions of the corporation that there are serious defects in current law which undermine the benefit security of multiemployer plan participants.

H.R. Rep. No. 869, Part I, 96th Cong., 2d Sess. 57, *reprinted in* (1980) Code Cong. & Ad. News 2925. The Committee also stated that it considered the MPPAA necessary, because failure to act "would create economic havoc and do serious harm to active workers and retirees

in, and employers contributing to, multiemployer plans." *Id.*, H.R. Rep. at 63, Code Cong. at 2931-2.

On April 30, 1980, Congress delayed, for the third time, implementation of the mandatory guarantees. In April 1980, the House approved the MPPAA and in July 1980, the Senate did the same. In September 1980, the differences in the two versions were reconciled. *Peick v. PBGC* at 10-11.

29 U.S.C.A. § 1001a (supp. 1981) sets forth the Congressional Findings and Declarations of Policy for the MPPAA:

(a) The Congress finds that

. . . .

(3) the continued well-being and security of millions of employees, retirees, and their dependents are directly affected by multiemployer pension plans; and

(4)(A) withdrawals of contributing employers from a multiemployer pension plan frequently result in substantially increased funding obligations for employers who continue to contribute to the plan, adversely affecting the plan, its participants and beneficiaries, and labor-management relations, and [that]

(B) in a declining industry, the incidence of employer withdrawals is higher and the adverse effects described in subparagraph (A) are exacerbated.

(b) The Congress further finds that

(1) it is desirable to modify the current multiemployer plan termination insurance provisions in order to increase the likelihood of protecting plan participants against benefit losses; and

(2) it is desirable to replace the termination insurance program for multiemployer pension plans with an insolvency-based benefit protection program that will enhance the financial soundness of such plans, place primary emphasis on plan continuation and contain program costs within reasonable limits.

In summary, imposition of withdrawal liability was intended to remove existing statutory incentives for employers to withdraw from troubled or potentially troubled plans, while providing that newly entering employers would not be saddled with obligations incurred prior to their entry into the plan. The withdrawal liability also was intended to insure that a withdrawing employer would fund a share of the obligations incurred during that employer's association with the plan.

B. Means of Remedying the Problem: The Burden

1. The Reliance Interest of the Affected Parties

Gray argues that prior to the enactment of the MPPAA, its sole perceived responsibility was "payment of a defined contribution to a jointly trusteed plan, the success of which did not depend on the employer." However, Section 10.03 of the Plan from wich Gray withdrew does contemplate the possibility of change through ERISA:

> *Except for liabilities which may result from provisions of ERISA,* nothing contained in this plan shall be construed to impose any obligation to contribute beyond the obligation of the Employer to make contributions as stipulated in its collective bargaining agreement. (Emphasis added).

Triplett Affidavit at 105. The Plan itself recognized that

the employers' obligations were subject to statutory modification.

When the bill containing the MPPAA was originally introduced on May 3, 1979, the bill retroactively applied to withdrawals on or after February 27, 1979. *Peick v. PBGC* at 67. February 27, 1979 remained the effective date for withdrawal liability until June 1980, when the Senate Finance Committee decided that the February 27, 1979 date was unnecessarily harsh and advanced the date to April 29, 1980. *Id.*

By April 29, 1980, the date which Gray attacks, the MPPAA had already received approval by the House Education and Labor Committee, the House Ways and Means Committee and the Senate Labor and Human Resources Committee. *Id.* Each approved version applied retroactively to withdrawals on or after February 27, 1979. *Id.* at 67-68. The pre-enactment circumstances therefore provided employers with some notice that they could not rely on the contribution obligation of their collective bargaining agreements. Judge Getzendanner relied on this history to reason that fair warning of a statute's terms before its enactment can mitigate reliance and pointed to similar reasoning in *United States v. Hudson,* 299 U.S. 498 (1937) and in *United States v. Darusment,* 449 U.S. 292 (1981). *Peick v. PBGC* at 68-70.

The employees' reliance on the promise of vested pension benefits must be balanced against the employers' reliance on a defined contribution. I conclude, as did the Congress, that the employees' reliance interest outweighs the employers'. I also conclude that this factor does not weigh against the statute.

2. **Previous Regulation of the Area**

Pension plan termination is an area which is heavily regulated by the federal government. *Nachman*, 592 F.2d at 962. Even before ERISA, the area was regulated. *See* Treas. Reg. § 1.401-6, cited in *Nachman*, 592 F.2d at 962, n. 33. As stated above, section 10.03 of the Plan from which Gray withdrew acknowledges ERISA regulation of the employer's liability. As originally enacted, ERISA provided that an employer could incur a withdrawal liability which exceeded the obligation to pay contributions in the situation where a multiemployer plan terminated within five years. 29 U.S.C. §§ 1363, 1364. The previous regulation of this area leads me to conclude that this factor does not weigh against the statute.

3. **The Equities**

Congress was concerned that if the MPPAA became effective only upon enactment, passage would precipitate early withdrawals. *Peick v. PBGC* at 71. Congress had been concerned with the fact that ERISA itself encouraged withdrawals. *Id.* One of the Congressional concerns about early withdrawals was the effect on the relative equities between the early withdrawing employer and the employer who remained in the plan to face even greater liabilities after the enactment of the MPPAA. *Id.* Therefore the equities to be balanced are those between the employees, the withdrawn employer and the remaining employers. In light of the magnitude of the problem being addressed by Congress, I find that the equities balance in favor of the employees and remaining employers when considering the withdrawing employers' incurring a fixed debt upon withdrawal. Gray points to the fact that although Congress feared many withdrawals would be precipitated by

the legislation, in fact, they did not occur in great or even significant numbers. The fact that these fears were not realized does not mean that acts to forestall such events were irrational. I conclude that this factor does not weigh against the statute.

4. Statutory Provisions Limiting and Moderating the Burden

Gray's position is that the MPPAA contains virtually no provisions which moderate the burden and that the moderating factors fall short of those in the statute upheld in *Nachman*.

The MPPAA does contain some mitigating features. One example is the *"de minimis* rule," 29 U.S.C.A. § 1389(a), which eliminates withdrawal liability for employers whose obligation would be below $50,000 or three fourths of one percent of the plan's unfunded vested obligations. The MPPAA does not require lump-sum payments but permits a schedule of payments under 29 U.S.C.A. § 1399(c).

Judge Hill in *Shelter Framing Corp.* and *G & R Roofing* concluded that the MPPAA had no significant features to moderate the imposition of a large liability, such as were present in *Nachman*: a grace period or a limitation of the employer's liability in relation to the employer's net worth. I agree with Judge Hill that the factor weighs against the statute.

C. Conclusion

Plaintiff carries a heavy burden of showing that the retroactivity of the MPPAA violates due process. To prevail, Gray must show the legislature acted in an "ar-

bitrary and irrational way." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. at 15. Plaintiff has shown that the MPPAA can and does sometimes exact a heavy burden from an employer who withdraws from a multiemployer pension plan. Gray has also shown that there is a paucity of ameliorating features in the plan adopted. But Gray has not shown that the plan and its retroactive application are irrational solutions to a serious problem. The plaintiff has not carried its burden.

IMPAIRMENT OF CONTRACT RIGHTS

The contract clause of the United States Constitution applies only to the states. *Nachman*, 592 F.2d at 959. The due process clause of the fifth amendment is implicated in legislation affecting contract rights. *Id.* at 960. The standard of review for federal legislation affecting or impairing contract rights is not settled. *Id. Peick v. PBGC* at 33. I do not decide the standard to be applied, but rule that to the extent that the MPPAA survives Gray's due process claim, it survives Gray's claim of impairment of contract rights. *See Peick v. PBGC* at 33; *Nachman*, 592 F.2d at 959.

EQUAL PROTECTION

Gray contends that the different treatment of employers in single-employer pension plans and multiemployer pension plans violates the equal protection clause of the fifth amendment. Gray points to two distinctions:

> (1) employers who contribute to a multiemployer plan can be liable upon withdrawal from a plan which continues in existence. Single employers are liable only when a plan terminates.

> (2) Single employers cannot become liable for more than thirty percent of their net worth. There is no upper limit on the liability of an employer who contributes to a multiemployer plan.

To prevail on this issue, Gray has the burden of showing that "the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [a court] can only conclude that the legislature's actions were irrational." *Hodel v. Indiana*, 452 U.S. 314, 331-32 (1981).

I find that Gray has not shown that the distinction between multiemployer and single-employer plans is irrational. As stated in the testimony of John B. Hall, Deputy Assistant Secretary for Tax Policy, Department of the Treasury, before a House Committee:

> [A]mong defined benefit pension plans, there are wide variations. We quickly despaired of devising a separate system for each type of defined benefit pension plan. Nevertheless, we did find it useful to make a distinction between two broad groups of plans — single-employer plans and multiemployer plans.
>
> Single-employer plans may cover only employees in a single plan or office, or may cover substantially all of a company's employees and plants throughout the country. These plans may or may not be collectively bargained. Most single-employer plans call for a specific benefit amount payable at retirement but do not specify a required employer contribution. They are generally administered by the employer and the employer generally has the right to terminate the plan at any time with no further liabililty for pension contributions.

> Multiemployer plans have significantly different characteristics. They generally require a specific employer contribution. They generally are administered by a joint employer-employee board of trustees which has the authority to set benefits. The employer's obligation is generally limited to making the specific contribution and a participating employer cannot terminate the plan although he may withdraw from it. Because of these differences, it is difficult to draft one insurance program which applies to both types of plans. [Bills to Revise the Welfare and Pension Plans Disclosure Act: Hearings on H.R. 2 and H.R. 462 before the House General Subcommittee on Labor of the Committee on Education and Labor, 93rd Cong. 1st Sess. 768-769 (1973).]

In light of the different makeup of single and multiemployer plans, different treatment of the withdrawals from each is not irrational. The withdrawal from a multiemployer plan, in the absence of withdrawal liability, shifts the burden to remaining employers. This situation does not occur in a single-employer plan.

The elimination of the thirty percent limitation of liability for employers withdrawing from multiemployer plans has a harsh result, but was imposed because Congress wished to deter withdrawals and their deleterious effects. *Peick v. PBGC* at 77 (citing legislative history). I cannot conclude that the measure was irrational. Congress concluded that there was a great threat to multiemployer plans and took steps to lessen the threat.

I find that Gray has failed to carry its burden of showing that the MPPAA irrationally distinguishes between the multiemployer and single-employer plans.

EX POST FACTO

Gray's *ex post facto* argument is without merit. The prohibition of the enactment of an *ex post facto* law applies to a statute which "assigns more disadvantageous criminal or penal consequences to an act than did the law in place when the act occurred." *Weaver v. Graham*, 450 U.S. 24, 29 n. 13 (1981), *cited in Peick v. PBGC* at 74, n. ***. No criminal or penal consequences are involved in the statute or fact situation before me.

ARBITRATION PROCEDURE

Gray contends that the arbitration procedure of the MPPAA violates the rights to procedural due process and trial by jury. As stated above, Gray waived its right to arbitration under the MPPAA. Gray contends that waiver of the right to arbitrate did not constitute a waiver of the right to attack the validity of the arbitration provisions.

I conclude that Gray has no standing to contest the validity of the arbitration provisions of the MPPAA. To meet the standing requirements of Article III, a plaintiff must show that it "suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant . . . ." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, ____ U.S. ____, 102 S. Ct. 752, 758 (1982). Gray has failed to show that it comes within the "actual injury" requirement with respect to the arbitration provisions of the MPPAA.

CONCLUSION

The MPPAA survives Gray's motion for summary judgment. I conclude that summary judgment should enter in favor of the defendant.

Dated this 11th day of August, 1982.

/s/

James A. Redden
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

R.A. GRAY & CO., Plaintiff,	)	Civil No. 81-912-RE OPINION
v.	)	
OREGON-WASHINGTON CARPENTERS-EMPLOYERS PENSION TRUST FUND and PENSION BENEFIT GUARANTY CORPORATION, Defendants.	)	

Thomas M. Triplett
Mildred J. Carmack
Schwabe, Williams, Wyatt,
Moore & Roberts
1200 Standard Plaza
1100 S. W. Sixth Avenue
Portland, Oregon 97204

Attorneys for Plaintiff.

William B. Crow
Miller, Nash, Yerke,
Wiener & Hager
900 S. W. Fifth Avenue
Portland, Oregon 97204

David S. Paull
Bailey & Paull
5441 S. W. Macadam Avenue
Portland, Oregon 97201

Attorneys for Defendant
Oregon-Washington Carpenters-
Employers Pension Trust Fund

Henry Rose, General Counsel
Baruch A. Fellner, Associate General Counsel
J. Stephen Caflisch, Special Counsel
David F. Power, Attorney
Pension Benefit Guaranty Corporation
Office of the General Counsel
2020 K Street, N.W.
Washington, D.C. 20006

Attorneys for Defendant
Pension Benefit Guaranty Corporation.

REDDEN, JUDGE:

IT IS ORDERED that the plaintiff's motion for summary judgment is denied. IT IS FURTHER ORDERED that the defendants' motions for summary judgment are granted.

Dated this 11th day of August, 1982.

/s/

James A. Redden
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

R.A. GRAY & CO.,	)	No. 82-3506
Plaintiff-Appellant,	)	DC CV 81-912 JAR
	)	
v.	)	
	)	
OREGON-WASHINGTON	)	
CARPENTERS-EMPLOYERS	)	
PENSION TRUST FUND and	)	
PENSION BENEFIT GUARANTY	)	
CORPORATION,	)	
	)	
Defendants-Appellees.	)	

APPEAL from the United States District Court for the PORTLAND District of OREGON.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the PORTLAND District of OREGON and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed.

Filed and entered May 20, 1983

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 82-3506

R.A. Gray & Co.

v.

Oregon-Washington Carpenters-Employers Pension Trust Fund and Pension Benefit Guaranty Corporation

On Appeal from the United States
District Court for the District of Oregon

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Pursuant to 28 U.S.C. § 1252, the Pension Benefit Guaranty Corporation hereby appeals to the Supreme Court of the United States from the judgment of this court in the above-captioned action entered on May 20, 1983.

/s/

BARUCH A. FELLNER
Associate General Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal to the Supreme Court of the United States was served by first class mail, postage prepaid, on this 14th day of June, 1983, on all parties required to be served:

Thomas M. Triplett, Esquire
Schwabe, Williamson, Wyatt,
Moore & Roberts
1100 Southwest 6th Avenue
Suite 1200
Portland, Oregon 97204

William B. Crow, Esquire
Miller, Nash, Yerke,
Wiener & Hager
900 Southw[illegible] 5th Avenue
Portland, O[illegible]gon 97204

David S. Paull, Esquire
Bailey & Paull, Esquire
5411 Southwest Macadam Avenue
Portland, Oregon 97201

/s/
BARUCH A. FELLNER
Associate General Counsel

APPENDIX E

3/10/83 — 138 cases

Litigation Attacking the Constitutionality of MPPAA

CASE	DATE	AMOUNT
A. Soloff & Son, Inc. v. *Jerry Asher, et al. and Trustees of the Amalgamated Cotton Garment and Allied Industries Fund* C.A. No. 82 Civ. 1981 (Z) (S.D.N.Y.)	11/7/80	$219,533
Acee Company, Inc. v. *Central States, Southeast and Southwest Areas Pension Fund and General Drivers and Helpers Union Local 373* C.A. No. 82-2279 (W.D. Ark.) (filed 11/23/82)	1/4/82	$202,513
AGA Burdox, Inc. v. Central States, Southeast and Southwest Areas Pension Trust C.A. No. (N.D. Ill.)	9/6/80	$887,645
Allan C. Ells v. *The Construction Laborers Pension Trust for Southern California* *C.A. No. 81-4910-TJH (Gx) (C.D. Calif.)* (Hatter, J.) (filed 10/29/81) Summary judgment for defendant -6/3/82	7/1/80	$291,135
American Trucking Associations, Inc., et al. v. *PBGC, et al.** C.A. No. J82-0061 (R) (S.D. Miss., Jackson Div.) (Russell, J.) (filed 2/4/82)	April 1980	$8,634,892

Arnold's, Inc., et al. v. *Retail Store Employees Union AFL-CIO and Drug and Mercantile Employers Joint Pension Fund,* C.A. No. 8270734 (E.D. Mich., S.D.) (Boyle, J.) (filed 3/2/82)	1981	$1,377,200
Aronson Tire Co., Inc. v. *Vincent Pisano, et al. and PBGC** C.A. No. 81-2554-C (D. Mass.) (Caffrey, C.J.) (Served 10/28/81)	4/26/80 or 5/5/80	$150,467
Arrow Transportation v. *New England Teamsters* C.A. No. 81-2703-S (D. Mass.) (Skinner, J.)	8/29/80	$965,534
Arrow Transportation v. *Local 707 Road Carriers Welfare and Pension Fund* C.A. No. 82-CV-0360 (E.D.N.Y.) (Bramwell, J.) Settled and dismissed - 10/13/82	6/30/80	$25,000
Auclair Transportation, Inc. v. *New England Teamsters* C.A. No. C-81-546-L (D.N.H.) (filed 10/30/81)	1/14/81	$2,546,513
Automotive Spring Corp., et al. v. *National Industrial Group Pension Plan* C.A. No. 81-2921 (D.N.J.) (Meanor, J.) (filed 9/15/81)	7/27/80	$502,874
Avnet, Inc. v. *Appleton, et al.* C.A. No. 82 Civ. 1119 (S.D.N.Y.) (Conner, J.) (filed 2/24/82)	12/7/80	$153,565

Avnet v. *Central States, Southeast and Southwest Areas Pension Trust* C.A. No. 81-C-6132 (N.D. Ill. E.D.) (Aspen, J.) (filed October 30, 1981) Settled and dismissed - 8/6/82	10/5/81	$313,143.87
Bakersfield Concrete Construction, Inc., et al. v. *Construction Laborers Pension Trust for Southern California* C.A. No. 82-0044-WPG (C.D. Calif.) (Gray, J.) (filed 1/6/82) Summary judgment for defendant -1/10/83	7/1/81	$37,907.62
Baldwin, et al. v. *The Lincoln National Life Insurance Co.* C.A. No. 82-45-NW (E.D. Va., Newport News Div.)		
Baldwin, et al. v. *Shopmen's Ironworkers Pension Trust of Southern California* C.A. No. CV 81-5082 LTL (Mx) (C.D. Calif.) (Lydick, J.) (filed 9/30/81)	7/10/81	$639,793
Bangor Punta Corporation, et al. v. *Pisano, et al. and PGGC** C.A. No. 81-1688 Z (D. Mass.) (Zobel, J.)	8/20/80	$571,740
Brooke Bond Foods, Inc. v. *John Cook, et al.* C.A. No. 81 Civ. 6077 (S.D.N.Y.) (Owen, J.)	4/7/80	$1,085,900
C & S Wholesale Grocers, Inc. v. *New England Teamsters and Trucking Industry Pension Fund* C.A. No. 81-370 (D.Vt.) (Holdon, C.J.) (filed 12/2/81	3/27/81	$1,147,499

Calvert & Youngblood Coal Co., Inc. v. *UMWA 1950 Pension Trust, et al.* C.A. No. CV-82-P-1070-S (N.D. Ala., S.D.) (Pointer, J.) (filed 5/12/82)	3/27/81	$484,074.72
Center Corporation v. *Council 30 Retirement Plan et al.* C.A. No. 82-73130 (E.D. Mich.) (Taylor, J.) (filed 8/20/82)	12/30/80	$1,175,682
Cenco, Inc. v. *Central States, Southeast and Southwest Areas Pension Fund* C.A. No. 82-C-1867 (N.D. Ill., E.D.) (Leighton, J.) (filed 3/25/82) Settled and dismissed - 8/15/82	12/1/80	263,212
Classic Chemical, Inc. v. *International Association of Machinists* C.A. No. 382-0241F (N.D. Tex., Dallas Div.) (Porter, J.)	10/16/81	$454,236
Cleveland Metal Products Co., Inc. v. *Teamsters Local No. 507 Pension Fund, et al.* C.A. No. C81-2543 (N.D. Ohio, E.D.) (Manos, J.) (filed 12/21/81)	10/5/81	$302,100
Connolly, et al. v. *PBGC** C.A. No. 75-2037 DWW (C.D. Calif.) (Williams, J.) (amended complaint filed 8/19/82)		

Coronet Dodge, Inc. v. *Fred R. Speckman, et al.* C.A. No. 81-0724C (E.D. Mo.) (Filippine, J.) (filed 6/18/81) Summary judgment for defendant- 9/30/82 App. No. 82-2554-EM (8th Cir.) (filed 12/27/82)	6/30/80	$24,988
Coronet Dodge, Inc. v. *Loran W. Robbins, et al.* C.A. No. 82-0114-C(2) (E.D. Mo., E.D.) (Filippine, J.) Settled and dismissed - 6/29/82		
Cott Corporation v. *New England Teamsters and Trucking Industry Pension Fund* Bky., No. 2-80-00657 (D. Conn., Bky. Ct.)	2/6/81	$1,279,757
Cross Bros. Meat Packers, Inc., et al., v. *Independent Packing Houses, Beef Boners, Slaughterhouse, Hotel and Restaurant Suppliers Industry and Union Pension Plan, et al.* No. 83-1430	11/16/79	$1,357,466
Crown Cork & Seal Co., Inc. v. *District No. 9, et al.* C.A. No. 83-2875	July 1980	$162,000
D.J. Drywall, Inc. v. *Orange Belt Painters Pension Fund* C.A. No. 81-5330-RJK (Gx) (C.D. Calif.) (Kelleher, J.) (filed 10/14/81)	6/30/80	$225,672
Dealers Transport Company v. *Robbins, et al.* Bky. No. 80-21350 Adversary No. 81-1632 (Bky.Ct. W.D. Tenn.) (Third party complaint filed 12/3/81)	1/21/81	$6,045,779

Dorn's Transportation, Inc. et al. v. *Trucking Employees of North Jersey Welfare Fund, Inc. - Pension Account* C.A. No. 82-122 (HCM) (D.N.J.) (Meanor, J.) (filed 1/15/82)	3/9/81	$318,959
E.E. Black, Ltd, et al. v. *Hawaii Carpenters Pension Fund* C.A. No. 82-0045 (D. Hawaii) (filed 1/26/82) Dismissed by stipulation - 5/11/82	April 1981	
Eberhard Foods, Inc. v. *Retail Store Employees Union AFL/CIO and Food Employees Joint Pension Fund, et al.* C.A. No. G 82 23 CA1 (W.D. Mich. S.D.) (filed 1/15/82)	8/1/81	$1,450,741
Ex-Cell Home Fashions v. *ILGWU* C.A. No. 81-4847 (S.D.N.Y.) (Owen, J.) (filed 12/16/81)	June 1981	$265,340
F.H. Cobb Company, et al. v. *New York State Teamsters Conference Pension and Retirement Fund, et al.* C.A. No. 82-W-765 (N.D.N.Y.) (filed 7/21/82)	May 1980	$846,385
Federal Warehouse, Inc. and Federal Warehouse Trucking Co., Inc., New England Teamsters and Trucking Industrial Pension Fund No. 83-0859-T (D. Mass.) (4/1/83)	1/31/82	$54,380
First Interstate Bank of California v. *I.A.M. National Pension Fund* C.A. No. C 82 0753 WHO (N.D. Calif.) (Orrick, J.) (filed 2/23/82)	Feb. 1981	$261,816

Fisher Foods, Inc. v. *Amalgamated Food and Allied Workers District Union No. 430 Pension Fund* C.A. No. C-3-82-387 (S.D. Ohio W.D.)	7/18/81	$309,417
Fisher Foods, Inc. v. *The Ohio Meatpackers, Meat Cutters and Butcher Workmen Pension Plan and Trust* C.A. No. C82-1419 (N.D. Ohio, E.D.) (Lambros, J.) (filed May 28, 1982)	9/26/80	$70,811
Fisher Foods, Inc. v. *UFCW Unions' and Food Employers Pension Plan of Central Ohio,* C.A. No.____ (S.D. Ohio, E.D.) (rec'd 3/17/83)	Oct. 1981	$2,786,017
Flowers Industries, et al. v. *Bakery and Confectionery Union and Industry International Pension Fund,* C.A. No. 82-1365 (N.D. Ga., Atl. Div.) (filed June 30, 1982)	9/5/80 7/16/80 1/31/80	$1,268,494
4-D Builders Supply v. *Central States, Southeast and Southwest Areas Pension Trust* C.A. No. 81-10211 (E.D. Mich.) (Harvey, J.) (filed 11/2/81)	5/4/80	$252,201
Fox & Ginn, Inc. v. *Pisano, et al. and PBGC** C.A. No. 82-1078-K (D. Mass.) (Keeton, J.) (filed 4/26/82) PBGC dismissed as party - 7/27/82		$22,230
Frito-Lay, Inc. v. *New England Teamsters and Trucking Industry Pension Fund* C.A. No. 82-1780-Ma (D. Mass.) (Mazzone, J.) (filed 6/24/82)	1981	$482,502

Fritz a. Nachant, Inc. v. *Operating Engineers Pension Trust and PBGC** C.A. No. 82-0373 (S.D. Calif.) (Thompson, J.) (amended complaint filed 6/7/82) Stayed pending outcome of *Connolly* App. No. 82-8120 (9th Cir.) (PBGC interlocutory appeal filed 8/11/82)	6/15/80	$40,888
G & R Roofing Co. v. *Carpenters Pension Trust** C.A. No. 81-5551 CBM (C.D. Calif.) (Hill, J.) (filed 10/27/81) PBGC intervention denied -3/15/82 App. No. 82-5272 (9th Cir.) (filed 3/16/82) Portion of MPPAA found unconstitutional - 4/13/82 App. Nos. 82-5461, 82-5462 (filed 4/30/82)	Aug. 1980	$208,774
Gangi Construction, et al. v. *Operating Engineers Pension Trust for Southern California* C.A. No. 80-0043-JRK (Px) (C.D. Calif.) (Kelleher, J.) (filed 1/27/82)	7/1/80	$174,227 $212,246 $28,881 $283,878 $45,526
General Oil Co., et al. v. *New England Teamsters* C.A. No. 81-2821-N (D. Mass.) (Nelson, J.) (filed 11/14/81)	1/5/81 5/31/81	$252,512
Gilmore Steel Corp. v. *Western Conference of Teamsters Pension Fund* C.A. No. C 82-3993 (N.D. Calif.) (Patel, J.) (filed July 29, 1982)	8/13/80	$946,248

Gladding Corp. v. Amalgamated Cotton Garment and Allied Industries Fund C.A. No. 83-CV-0554 (S.D.N.Y.) (Owen, J.) (filed 1/18/83)	6/25/82	$207,507
Grano Steel Corp. v. *Shopmen's Ironworkers* C.A. No. CV 81-5862 LEW (JRx) (C.D. Calif.) (First amended complaint filed 11/25/81) (Waters, J.)	5/31/80	$306,710
H.M. Gammon Manufacturing Corp. v. *Trustees of Amalgamated Insurance Fund,* C.A. No. 81-7612 (S.D.N.Y.) Dismissed - 11/15/82	April 1980	$146,842
Hertz Corp. v. *The Commission Salesmen, Drivers and Helpers Union Local 187 Pension Fund* C.A. No. 81-5034 (E.D. Pa.) (Fullam, J.)	2/1/81	$393,079
Intercity Transportation, Inc. v. *PBGC, et al.** C.A. No. 82-0256 (D. Mass.) (Keeton, J.) (filed 2/1/82)	6/1/81	$997,193
International Multifoods Corp. v. *Central States, Southeast and Southwest Areas Pension Fund* C.A. No. 81 C 6927 (N.D. Ill., E.D.) (McGarr, J.) (filed 12/11/81)	6/15/80	$227,518
Interstate United Corporation of Michigan v. *Council 30, etc.* C.A. No. 81-74664 (E.D. Mich., S.D.) (DeMascio, J.) (filed 12/15/81)	May 1981	$364,535

IUE AFL-CIO Pension Fund, et al. v. *Erie Universal Products Corp.* C.A. No. 82-2252 (D.N.J.) (Sarokin, J.) (filed 7/14/82) Constitutional issued raised by summary judgment motion - 12/20/82	3/13/81	$23,728
Johnson Motor Lines, et al. v. *Central States, Southeast and Southwest Areas Pension Fund, et al.* C.A. No. 81 C 3703 (N.D. Ill. E.D.) (Hart, J.)	8/8/80	$16,658,936
Johnson Motor Lines, et al. v. *Trucking Employees of North Jersey Local 560 Pension Fund* C.A. No. 81-2344 (D.N.J.) (Meanor, J.)	8/8/80	$645,012
Jos. Schlitz Brewing Co. v. *PBGC, et al.** C.A. No. 82-C-0340 (E.D. Wis.) (Warren, J.) (filed March 19, 1982)	5/31/81	$41,031,406
1219 K.H. Mens Wear, Inc., d/b/a Neil's v. *Trustees of the Amalgamated Insurance Fund* C.A. No. 82-1742 (S.D.N.Y.)	May 1980	$14,410
Keith Fulton & Sons v. *New England Teamsters and Trucking Industry Pension Fund* C.A. No. 81-2378-S (D. Mass.) (Skinner, J.) (filed 10/27/81)	11/10/80	$468,637
Kraft, Inc. v. *Edward J. Malone, et al.* C.A. No. 81-930C(A) (E.D. Mo. E.D.) (Harper, J.) (filed 9/4/81)	5/30/81	$1,987,748

Kraft, Inc. v. *New York State Teamsters Conference Pension & Retirement Fund, et al.* C.A. No. 82-CV-1261 (N.D.N.Y.) (filed 11/12/82)	3/24/81	$543,969
Laredo Warehouse & Storage Co. v. *Central States, Southeast and Southwest Areas Pension Fund* C.A. No. L-83-3 (S.D. Tex.) (filed 1/20/83)	8/11/82	$175,708
Lawrence Motor Lines, Inc. v. *New England Teamsters and Trucking Industry Pension Fund* C.A. No. 81-3327-Ma (D. Mass.) (Mazzone, J.) (filed 12/31/81)	3/31/80	$51,804
Lewis & Coker Super Markets, Inc. v. *United Food & Commercial Workers International Union – Industry Pension Fund* C.A. No. CA3-81-2071H (N.D. Tex., Dallas Div.) (Barefoot Sanders, J.) (filed 11/22/81)	May 1981	$572,119
Lloyds Acceptance Corp. v. *Amalgamated Food & Allied Workers District Union No. 430 Pension Plan* C.A. No. C-3-82-169 (S.D. Ohio, W.D.)	June 1980	$1,029,000
MacMillan, Inc. v. *Amalgamated Insurance Fund* C.A. No. 81-CIV-6610 (S.D.N.Y.) (Brieant, J.) (filed 10/28/81)	7/25/80	$1,165,656
Malcolm Boring Co., Inc. v. *Operating Engineers Pension Trust* C.A. No. 81-6046-TJH (Kx) (C.D. Calif.) (Hatter, J.) (filed 11/27/81)	June 1980	$200,941

Manning Bros. Rock & Sand Co. v. PBGC, et al.* C.A. No. CV-81-6123 RMT (Tx) (C.D. Calif.) (Takasugi, J.) (filed 12/3/81)	8/30/80	$204,584
Merit Clothing Co., Inc. v. *PBGC, et al.** C.A. No. 82-0005 (W.D. Ky., Paducah Div.) (Johnstone, J.) (filed 1/21/82) Agreed order of dismissal - 11/23/82	9/26/80	$4,043,846
Metropolitan Distributors, Inc. and Delphi Industries, Inc. v. *Central States, Southeast and Southwest Areas Pension Fund, et al. and PBGC,* C.A. No. 82-C4306 (N.D. Ill. E.D.) (Moran, J.) (filed July 12, 1982)	Sept. 1981	$120,475.10
Motorways Leasing, Inc. v. *Central States, Southeast and Southwest Areas Pension Fund, et al.* C.A. No. 8270630 (E.D. Mich. S.D.) (Freeman, J.) (filed 2/22/82)	May 1980	$587,773
Mr. Pleat, et al. v. *ILGWU National Retirement Fund* C.A. No. 821622 AAH (C.D. Calif.) (Hauk, J.) (filed 4/1/82)	7/31/80	$182,204 $55,742 $32,814 $71,110
Municipal Engineers, Inc. v. *Operating Engineers Pension Trust and PBGC** C.A. No. 82-0372 (S.D. Calif.) (Nielsen, J.) (amended complaint filed 6/7/82)	7/1/80	$118,701

National Steel Service Center, In. v. *Central States, Southeast, and Southwest Areas Pension Fund, et al.* C.A. No. 82 C 5315 (N.D. Ill., E.D.) (McGarr, J.) (filed 8/27/82)	7/31/80	$184,452
National Tea Packing Co., Inc. v. *Retail, Wholesale & Department Store International Union and Industry Pension Fund, et al.* C.A. No. CV 82-1365 (E.D.N.Y.) (Platt, J.) (filed 5/18/82)	1/1/81	$406,698
National Wine and Spirits Corp. v. *Central States, Southeast, and Southwest Areas Pension Fund, et al.,* C.A. No. IP 83-40C (S.D. Ind.) (filed 1/7/83)	7/8/80	$452,030
Oxford Hopkins Co., Inc. v. *IUE AFL-CIO Pension Fund, et al.* C.A. No. 82-2632-N (D. Mass.)	11/28/81	$245,532
Ozark Empire Distributors, Inc. v. *Bakery & Confectionery Union and Industry International Pension Fund* C.A. No. 82-5031 (W.D. Ark.) (filed 2/12/82) Settled –	4/29/80	$74,188
Pacific Iron & Metal Company v. *Western Conference of Teamsters Pension Trust Fund* C.A. No. C82-653 (W.D. Wash., Seattle Div.) (filed 5/27/82) Summary judgment for defendant - 10/13/82	10/1/81	$84,830

Pantry Pride, Inc. and Pantry Pride Enterprises, Inc. v. *Retail Clerks Tri-State Pension Fund, et al.* C.A. No. 83-0466 (E.D. Pa.) (filed 1/28/83)	July 1981	$20,935,050
Peick, et al. v. *PBGC, et al.** C.A. No. 81 C 1911 (N.D. Ill. E.D.) (Getzendanner, J.) Summary judgment for defendant - 5/14/82 No. 82-2081 (7th Cir.) (filed 7/7/82)		
Penfield & Smith Engineers, Inc. v. *Operating Engineers Pension Trust and PBGC** C.A. No. 82-0371 (S.D. Calif.) (Keep, J.) (amended complaint filed 6/7/82)	9/15/80	$210,872
Penn Elastic Company v. *United Retail and Wholesale Employees Union, Local 115 Joint Pension Fund* C.A. No. 82-0777 (E.D. Pa.) (Van Artsdalen, J.) (filed 2/19/82)	8/10/81	$894,134
Pershing Industries, et al. v. *Trustees of the Cotton Garment & Allied Industries Pension Fund* No. 81-CIV-7469-ES (S.D.N.Y.) (Stewart, J.)	5/24/80	$20,669
Product Miniature Company, Inc. v. *I.A.M. National Pension Fund* C.A. No. 82-C-0136 (E.D. Wis.) (Reynolds, C.J.) (filed 2/10/82) Settled and dismissed - 6/21/82)	11/1/80	$197,578

Production Machinery Corp. v. *Northwest Ohio Area Industries UAW Retirement Income Plan* C.A. No. C83-323 (N.D. Ohio, W.D.) (Potter, J.) (4/7/83)	March Early April 1980	$240,858
PYA/Monarch, Inc. v. *Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund, et al.* C.A. No. 81 C 5491 (N.D. Ill. E.D.) (Flaum, J.) (filed 10/1/81)	6/26/81	$381,594
R.A. Gray & Co. v. *Oregon-Washington Carpenters - Employers Pension Trust Fund and PBGC** C.A. No. 81-912 (D. Ore.) (Redden, J.) Summary judgment for defendant-8/12/82 App. No. 82-3506 (9th Cir.) (filed 9/10/82)	6/1/80	$201,359
RCB Construction, Inc., et al. v. Silver, et al. C.A. No. CV-81-5350 RJK P (x) C.D. Calif.) (Kelleher, J.) (first amended complaint filed 10/27/81)	7/1/81	$163,057 $26,048 $8,797 $349,544 $129,158
R.T. Curtis, Inc. v. *Pisano, et al PBGC** C.A. No. 82-1130-Z (D. Mass.) (Zobel, J.) (filed 4/29/82)	12/30/80	$79,458

Republic Industries, Inc. v. *Central Pennsylvania Teamsters Pension Fund* C.A. No. 82-0146 (E.D. Pa.) (Troutman, J.) Defendant motion to dismiss granted - 3/22/82 App. No. 82-1251 (3d Cir.) (filed 4/21/82) Reversed and remanded for arbitration - 11/19/82	8/8/80	$848,494
Republic Industries, Inc. v. *New England Teamsters and Trucking Industry Pension Fund* C.A. No. 81-2551-S (D. Mass.) (Skinner, J.)	8/8/80	$1,402,961
Republic Industries, Inc. v *Teamsters Joint Council No. 83 of Virginia Pension Plan* C.A. No.82-0919-A (E.D. Va.) (filed 10/5/82) Withdrawal liability provisions constitutional - 12/29/82 App. No. 83-1054 (L) (4th Cir.) (filed 1/28/83)	8/8/80	$189,107
Rhode Island Welding Supply Co., Inc. v. *New England Teamsters & Trucking Industry Pension Fund* C.A. No.82-0041-G (D. Mass.) (Garrity, J.) (filed 1/27/82)	3/31/80	$7,314
Robbins, et al. v. *PBGC*• C.A. No. 79 C 2601 (N.D. Ill. E.D.) (McGarr, C.J.)		
Robert Fawcett & Son Company, Inc. v. *New England Teamsters and Trucking Industry Pension Fund* C.A. No. 81-3134-G (D. Mass.) (Garrity, J.) (filed 12/23/81)	3/31/81	$33,445

Robertson's Linen Service v. *Central States, Southeast and Southwest Areas Pension Trust* C.A. No. 81-74350 (E.D. Mich.) (Cook, J.)	6/11/80	$124,269
Rockford Drop Forge Co. v. *International Association of Machinists National Pension Fund* C.A. No. 81 C. 5774 (N.D. Ill. E.D.) (Aspen, J.) (filed 10/15/81) Dismissed - 12/4/81	4/27/80	$45,007
Roy L. Klema Engineers, Inc. v. *Operating Engineers Pension Trust and PBGC** C.A. No. 82-0370 (S.D. Calif.) (Turrentine, J.) (amended complaint filed 6/7/82) Stayed pending outcome of *Connolly* App. No. 82-8120 (9th Cir.) (PBGC interlocutory appeal filed 8/11/82)	Aug. 1980	$173,903
S & M Paving, Inc. v. *The Construction Laborers Pension Trust for Southern California* C.A. No. CV-81-5929 Kn P(x) (C.D. Calif.) (Hatter, J.) (filed 11/19/81) Summary judgment for defendant-5/10/82	7/1/80	$160,347
Salem Laundry Co. v. *New England Laundry Workers Pension Fund, et al.* C.A. No. 82-2749-G (D. Mass.)		

Salem Laundry Co. v. *New England Teamsters and Trucking Industry Pension Fund* C.A. No. 81-3160-G (D. Mass.) (Garrity, J.)	11/30/80	$173,831
San Diego Gas & Electric Co. v. *Western Conference of Teamsters Pension Trust Fund and PBGC** C.A. No. 82-0459-GT (S.D. Calif.) (Thompson, J.) (filed 5/5/82) Arbitration pending	June 1980	$162,921
Sands, Taylor, Wood & Co. v. *Grady* C.A. No. 82-0726 (D. Mass.) (Nelson, J.) (filed 3/16/82) Decision finding that administrative remedies not required - 10/5/82		
Shelter Framing Corporation v. *Carpenters Pension Trust for Southern California** C.A. No. 81-4457 (C.D. Calif.) (Hill, J.) PBGC intervention denied -3/15/82 App. No. 82-5271 (9th Cir.) (filed 3/16/82) Portion of MPPAA found unconstitutional - 4/13/82 App. Nos. 82-5460 (filed 4/30/82)	7/1/80	$797,648
Shull Truck Line Company, Inc. v. *Central States, Southeast, and Southwest Areas Pension Fund* C.A. No. 81-1184 (W.D. Tenn.) (filed 11/17/81)	8/15/80	$96,303

Sibley, Lindsay & Carr Co. v. *Bakery, Confectionery and Tobacco Workers International Union of America, AFL-CIO, et al.* C.A. No. 82-555T (W.D.N.Y.) (filed June 23, 1982) Appeal filed 2nd Cir. - No. 83-7328	5/31/80	$315,927
Sierra Pacific Industries v. *The Lumber Industry Pension Fund & PBGC, et al.** C.A. No. No. CIV S-82-459 LKK (E.D. Calif.) (Karlton, J.) (filed 6/7/82)	5/8/80	$66,265
Specialty Paper Box Co. v. *The Paper Industry Union-Management Pension Fund* C.A. No. 82-2945-KH (NCx) (C.D. Calif.) (filed 6/11/82)	8/17/81	$547,400
Fred R. Speckmann, et al. v. *Barford Chevrolet Company* C.A. No. 81-0795(C) (E.D. Mo.) (Meredith, J.) (filed 17/7/81) Summary judgment for defendant - 3/10/82	4/29/80	$38,988
Fred R. Speckmann, et al. v. *Suburban Ford Sales, Inc.* No. 81-891 C (2) (E.D. Mo.) (Nangle, J.)	9/1/80	$49,035
Spector Red Ball, Inc., et al. v. *PBGC, et al.** Adv. No. 5-82-0491-T (W.D. Tex. (Bky.)) (filed 10/19/82)	4/26/81 or 4/26/82	$1,054,861

Stoeven Brothers v. *California-Butchers Pension Trust Fund* C.A. No. C-82-0558 (RFP) (N.D. Calif.) (Peckman, C.J.) (filed 2/4/82)	March 1981	$845,652
Stop & Shop Companies, Inc. v. *Local 464A Pension Fund* C.A. No. 81-4028 (D.N.J.) (Meanor, J.) (filed 12/30/81)	8/22/81	$899,630
Tanney's Motor Transportation, Inc. v. *New York State Teamsters Conference Pension and Retirement Fund, et al.* C.A. No. 82-CV-801 (N.D.N.Y.) (Munson, J.)	3/31/80	$281,494
Teamsters Joint Council No. 83 of Virginia Pension Fund, et al. v. *The Davidson Transfer and Storage Co.* C.A. No. 81-1007-R (E.D. Va., Richmond Div.) (filed November 13, 1981)	5/1/82	$1,741,466
Textile Workers Pension Fund v. *Standard Dye & Finishing Co., Inc.* No. 83-7004	6/9/80	$900,000
The Hunter Corporation v. *New England Teamsters and Trucking Industry Pension Fund* C.A. No. B-82-325 (D. Conn.) (filed 6/3/82)	5/11/81	$200,956
The TJM Corporation, et al. v. *Board of Trustees, Paper Converters-Local 286 Pension Plan and PBGC** C.A. No. 82-4117 (E.D. Pa.) (Hannum, J.) (filed 6/10/82) PBGC dismissed as party - 1/3/83	July 1980	$200,627

The Terson Company, Inc. v. *Bakery Drivers & Salesmen Local 194 and Industry Pension Fund* C.A. No. 82-4058 (SH) (D.N.J.) (Sarokin, J.)	Oct. 1980	$835,320
The Terson Company, Inc. v. *PBGC, et al.** C.A. No. 81 C 4176 (N.D. Ill. E.D.) (McGarr, C.J.) Dismissed on basis of arbitration award -	Oct. 1980	$835,320
The Washington Star Co. v. *International Typographical Union Negotiated Pension Plan* C.A. No. 82-1568 (D.D.C.) (Green, J.) (filed June 8, 1982) Summary judgment for defendant - 2/9/83	Aug. 1981	$485,007
T.I.M.E.-DC, Inc. v. *Management-Labor Welfare and Pension Funds of Local 1730 International Longshoremen's Association* C.A. No. 82-6659 (VLB) (S.D.N.Y.) (Broderrick, J.) (filed 10/7/82)	3/27/81	$206,200
T.I.M.E.-DC, Inc. v. *Trucking Employees of North Jersey Welfare Fund, Inc.* C.A. No. 82 Civ. 3212 (E.D.N.Y.) (filed 10/25/82)	4/8/82	$373,628

Transport Motor Express, Inc., et al. v. *Central States, Southeast and Southwest Areas Pension Fund, et al.* C.A. No. 81 C 4535 (N.D. Ill. E.D.) (Flaum, J.) (filed 8/10/81) Appeal filed 2nd Cir – No. 83-2026	4/24/80 or 4/26/80	$8,071,885
UFCW International Union-Industry Pension Fund and John E. Boyd v. *The Schear Group. Inc., et al.* C.A. No.____ (S.D. Ohio, W.D.) (filed January __, 1982)		
UFCW Unions and Food Employers Pension Plan of Central Ohio and Kenneth V. Mitchell v. *The Shear Group, Inc., et al.* C.A. No. C-3-81-439 (S.D. Ohio, W.D.) (Rice, J.) (filed November __, 1981)	Jan. 1981	$3,479,130
United Engine & Machine Co., Inc. v. *International Association of Machinists and Aerospace Workers AFL-CIO, National Pension Fund* C.A. No. C 82 2032 TEH (N.D. Calif.) (Henderson, J.) (filed 5/5/82)	April 1981	$1,769,531
Universal Sewer Pipe Company v. *United Brick and Clay Workers of America, AFL-CIO, District Council #9 Pension Fund* C.A. No. 2-82-55 (S.D. Ohio, E.D.) (filed 1/15/82) Dismissed - 4/1/82	4/28/80	$416,010

Vesci, Inc. v. *Central States, Southeast and Southwest Areas Pension Fund* C.A. No. 81-7286 (N.D. Ill. E.D.) (Kocoras, J.) (filed 12/30/81)	7/1/80	$142,044
Victor Construction Co. v. *The Construction Laborers Pension Trust for Southern California* C.A. No. 81-5144-TJH (Gx) (C.D. Calif.) (Hall, J.) (filed 10/29/81) PBGC motion to dissolve injunction denied - 3/7/82 App. No. 82-5479 (filed 5/12/82) Appeal dismissed - 11/30/82	1/1/81	$77,360
Warner-Lamber Co., Inc. v. *United Retail and Wholesale Employees' Teamster Local No. 115 Pension Fund* C.A. No. 82-1080 (E.D. Pa.) (Van Artsdalen, J.) (filed 3/10/82)	9/19/80	$1,417,533
Winn-Dixie Stores, Inc. v. *UFCW International Union-Industry Pension Fund* C.A. No. 82-491-Civ-J-JHM (M.D. Fla., Jacksonville Div.)	6/27/80	$111,094
Witte Transportation Co., et al. v. *Central States, Southeast and Southwest Areas Pension Fund, et al.* C.A. No. 4-81-472 (D. Minn.) (Lord, J.)	6/14/80	$2,193,714
Woodward Sand Co., Inc. v. *Operating Engineers Pension Trust* C.A. No. 81-920-N(I) (S.D. Calif.) (Nielsen, J.) (filed 9/23/81)	8/15/80	$264,524

•Cases in which PBGC is a party.

APPENDIX F

29 U.S.C. (1976).

§ 1001. Congressional findings and declaration of policy

(a) The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of emloyee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability

of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiares have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) It is hereby further declared to be the policy of this Act to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

§ 1002

* * *

(37) (A) The term "multiemployer plan" means a plan—

(i) to which more than one employer is required to contribute,

(ii) which is maintained pursuant to one or more collective-bargaining agrements between an employee organization and more than one employer,

(iii) under which the amount of contributions made under the plan for a plan year by each employer making such contributions is less than 50 percent of the aggregate amount of contributions made under the plan for that plan year by all employers making such contributions,

(iv) under which benefits are payable with respect to each participant without regard to the cessation of contributions by the employer who had employed that participant except to the extent that such benefits accrued as a result of service with the employer before such employer was required to contribute to such plan, and

(v) which satisfies such other requirements as the Secretary may by regulations prescribe.

(B) For purposes of this paragraph—

(i) if a plan is a multiemployer plan within the meaning of subparagraph (A) for any plan year, clause (iii) of subparagraph (A) shall be applied by substituting "75 percent" for "50 percent" for each subsequent plan year until the first plan year following a plan year in which the plan had one employer who made contributions of 75 percent or more of the aggregate amount of contributions made under the plan for that plan year by all employers making such contributions, and

(ii) all corporations which are members of a controlled group of corporations (within the meaning of section 1563(a) of Title 26, determined without regard to section 1563(e)(3)(C) of Title 26) shall be deemed to be one employer.

§ 1302. Establishment; powers; board of directors; board meetings; bylaws and rules; exemption from taxation; budget; advisory committee

(a) There is established within the Department of Labor a body corporate to be known as the Pension Benefit Guaranty Corporation. In carrying out its functions under this subchapter, the corporation shall be administered by the chairman of the board of directors in accordance with policies established by the board. The purposes of this subchapter, which are to be carried out by the corporation, are—

(1) to encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants,

(2) to provide for the timely and uninterrupted payment of pension benefits to participants and beneficiaries under plans to which this subchapter applies, and

(3) to maintain premiums established by the corporation under section 1306 of this title at the lowest level consistent with carrying out its obligations under this subchapter.

§ 1322. Benefits guaranteed

(a) Subject to the limitations contained in subsection (b) of this section, the corporation shall guarantee the payment of all nonforfeitable benefits (other than benefits becoming nonforfeitable solely on account of the termination of a plan) under the terms of a plan which terminates at a time when section 1321 of this title applies to it.

(b)(1) Except to the extent provided in paragraph (8)—

(A) no benefits provided by a plan which has been in effect for less than 60 months at the time the plan terminates shall be guaranteed under this section, and

(B) any increase in the amount of benefits under a plan resulting from a plan amendment which was made, or became effective, whichever is later, within 60 months before the date on which the plan terminates shall be disregarded.

(2) For purposes of this subsection, the time a successor plan (within the meaning of section 1321(a) of this title) has been in effect includes the time a previously established plan (within the meaning of section 1321(a) of this title) was in effect. For purposes of determining what benefits are guaranteed under this section in the case of a plan to which section 1321 of this title does not apply on September 3, 1974, the 60 month period referred to in paragraph (1) shall be computed beginning on the first date on which such section does apply to the plan.

(3) The amount of monthly benefits described in subsection (a) of this section provided by a plan, which are guaranteed under this section with respect to a participant, shall not have an actuarial value which exceeds the actuarial value of a monthly benefit in the form of a life annuity commencing at age 65 equal to the lesser of—

(A) his average monthly gross income from his employer during the 5 consecutive calendar year period (or, if less, during the number of calendar years in such period in which he actively participates in the plan) during which his gross income from that employer was greater than during any other such period with that employer determined by dividing 1/12 of the sum of all such gross income by the number of such calendar years in which he had such gross income, or

(B) $750 multiplied by a fraction, the numerator of which is the contribution and benefit base (determined under section 430 of Title 42) in effect at the time the plan terminates and the denominator of which is such contribution and benefit base in effect in calendar year 1974.

The provisions of this paragraph do not apply to non-basic benefits.

(4)(A) The actuarial value of a benefit, for purposes of this subsection, shall be determined in accordance with regulations prescribed by the corporation.

(B) For purposes of paragraph (3)—

(i) the term "gross income" means "earned income" within the meaning of section 911(b) of Title 26 (determined without regard to any community property laws),

(ii) in the case of a participant in a plan under which contributions are made by more than one employer, amounts received as gross income from any employer under that plan shall be aggregated with amounts received from any other employer under that plan during the same period, and

(iii) any non-basic benefit shall be disregarded.

(5) Notwithstanding paragraph (3), no person shall receive from the corporation for basic benefits with respect to a participant an amount, or amounts, with an actuarial value which exceeds a monthly benefit in the form of a life annuity commencing at age 65 equal to the amount determined under paragraph (3)(B) at the time of the last plan termination.

(6)(A) For purposes of this subchapter, the term "substantial owner" means an individual who—

(i) owns the entire interest in an unincorporated trade or business,

(ii) in the case of a partnership, is a partner who owns, directly or indirectly, more than 10 percent of either the capital interest or the profits interest in such partnership, or

(iii) in the case of a corporation, owns, directly or indirectly, more than 10 percent in value of either the voting stock of that corporation or all the stock of that corporation.

For purposes of clause (iii) the constructive ownership rules of section 1563(e) of Title 26 shall apply (determined without regard to section 1563(e)(3)(C)). For purposes of this subchapter an individual is also treated as a substantial owner with respect to a plan if, at any time within the 60 months preceding the date on which the determination is made, he was a substantial owner under the plan.

(B) In the case of a participant in a plan under which benefits have not been increased by reason of any plan amendments and who is covered by the plan as a substantial owner, the amount of benefits guaranteed under this section shall not exceed the product of—

(i) a fraction (not to exceed 1) the numerator of which is the number of years the substantial owner was an active participant in the plan, and the denominator of which is 30, and

(ii) the amount of the substantial owner's monthly benefits guaranteed under subsection (a) of this section (as limited under paragraph (3) of this subsection).

(C) In the case of a participant in a plan, other than a plan described in subparagraph (B), who is covered by the plan as a substantial owner, the amount of the benefit guaranteed under this section shall, under regulations prescribed by the corporation, treat each benefit increase attributable to a plan amendment as if it were provided under a new plan. The benefits guaranteed under this section with respect to all such amendments shall not exceed the amount which would be determined under subparagraph (B) if subparagraph (B) applied.

(7)(A) No benefits accrued under a plan after the date on which the Secretary of the Treasury issues notice that he has determined that any trust which is a part of a plan does not meet the requirements of section 401(a) of Title 26, or that the plan does not meet the requirements of section 404(a)(2) of Title 26, are guaranteed under this section unless such determination is erroneous. This subparagraph does not apply if the Secretary subsequently issues a notice that such trust meets the requirements of section 401(a) of Title 26 or that the plan meets the requirements of section 404(a)(2) of Title 26 and if the Secretary determines that the trust or plan has taken action necessary to meet such requirements during the period between the issuance of the notice referred to in the preceding sentence and the issuance of the notice referred to in this sentence.

(B) No benefits accrued under a plan after the date on which an amendment of the plan is adopted which causes the Secretary of the Treasury to determine that any trust under the plan has ceased to meet the requirements of section 401(a) of Title 26 or that the plan has ceased to meet the requirements of section 404(a)(2) of Title 26, are guaranteed under this section unless such determination is erroneous. This subparagraph shall not apply if the amendment is revoked as of the date it was first effective or amended to comply with such requirements.

(8) Benefits described in paragraph (1) are guaranteed only to the extent of the greater of—

(A) 20 percent of the amount which, but for the fact that the plan or amendment has not been in effect for 60 months or more, would be guaranteed under this section, or

(B) $20 per month,

multiplied by the number of years (but not more than 5) the plan or amendment, as the case may be, has been in effect. In determining how many years a plan or amendment has been in effect for purposes of this paragraph, the first 12 months following the date on which the plan or amendment is made or first becomes effective (whichever is later) constitutes one year, and each consecutive period of 12 months thereafter constitutes an additional year. This paragraph does not apply to benefits payable under a plan unless the corporation finds substantial evidence that the plan was terminated for a reasonable business purpose and not for the purpose of obtaining the payment of benefits by the corporation under this subchapter.

(c) The corporation is authorized to guarantee the payment of such other classes of benefits and to establish the

terms and conditions under which such other classes of benefits are guaranteed as it determines to be appropriate.

§ 1361. Amounts payable by corporation

The corporation shall pay benefits under a plan terminated under this subchapter subject to the limitations and requirements of subtitle B of this subchapter. Amounts guaranteed by the corporation under section 1322 of this title shall be paid by the corporation out of the appropriate fund.

§ 1362. Liability of employer

Employers covered

(a) This section applies to any employer who maintained a plan (other than a multiemployer plan) at the time it was terminated, but does not apply—

(1) to an employer who maintained a plan with respect to which he paid the annual premium described in section 1306(a)(2)(B) of this title for each of the 5 plan years immediately preceding the plan year during which the plan terminated unless the conditions imposed by the corporation on the payment of coverage under section 1323 of this title do not permit such coverage to apply under the circumstances, or

(2) to the extent of any liability arising out of the insolvency of an insurance company with respect to an insurance contract.

Amount of liability

(b) Any employer to which this section applies shall be liable to the corporation, in an amount equal to the lesser of—

(1) the excess of—

(A) the current value of the plan's benefits guaranteed under this subchapter on the date of termination over

(B) the current value of the plan's assets allocable to such benefits on the date of termination, or

(2) 30 percent of the net worth of the employer determined as of a day, chosen by the corporation but not more than 120 days prior to the date of termination, computed without regard to any liability under this section.

§ 1364. Liability of employers on termination of plan by more than one employer

(a) This section applies to all employers who maintain a plan under which more than one employer makes contributions at the time such plan is terminated, or who, at any time within the 5 plan years preceding the date of termination, made contributions under the plan.

(b) The corporation shall determine the liability of each such employer in a manner consistent with section 1362 of this title except that the amount of the liability determined under section 1362(b)(1) of this title with respect to the entire plan shall be allocated to each employer by multiplying such amounts by a fraction—

(1) the numerator of which is the amount required to be contributed to the plan by each employer for the last 5 plan years ending prior to the termination, and

(2) the denominator of which is the total amount required to be contributed to the plan by all such employers for such last 5 years,

and the limitation described in section 1362(b)(2) of this title shall be applied separately to each employer. The corporation may also determine the liability of each such employer on any other equitable basis prescribed by the corporation in regulations.

§ 1381. Effective date; special rules

(a) The provisions of this subchapter take effect on September 2, 1974.

(b) Notwithstanding the provisions of subsection (a) of this section, the corporation shall pay benefits guaranteed under this subchapter with respect to any plan—

(1) which is not a multiemployer plan,

(2) which terminate after June 30, 1974, and before September 2, 1974,

(3) to which section 1321 of this title would apply if that section were effective beginning on July 1, 1974, and

(4) with respect to which a notice is filed with the Secretary of Labor and received by him not later than 10 days after September 2, 1974, except that, for reasonable cause shown, such notice may be filed with the Secretary of Labor and received by him not later than October 31, 1974, stating that the plan is a plan described in paragraphs (1), (2), and (3).

The corporation shall not pay benefits guaranteed under this subchapter with respect to a plan described in the preceding sentence unless the corporation finds substantial evidence that the plan was terminated for a reasonable business purpose and not for the purpose of obtaining the payment of benefits by the corporation under this subchapter or for the purpose of avoiding the liability which might be imposed under subtitle D if the plan terminated on or after September 2, 1974. The provisions of subtitle D do not apply in the case of such a plan which terminates before September 2, 1974. For purposes of determining whether a plan is a plan described in paragraph (2), the provisions of section 1348 of this title shall not apply, but the corporation shall make the determination on the basis of the date on which benefits ceased to accrue or on any other reasonable basis consistent with the purposes of this subsection.

(c)(1) Except as provided in paragraphs (2), (3), and (4), the corporation shall not pay benefits guaranteed under this subchapter with respect to a multiemployer plan which terminates before January 1, 1978. Whenever the corporation exercises the authority granted under paragraph (2) or (3), the corporation shall notify the Committee on Education and Labor and the Committee on Ways and Means of the House of Representatives, and the Committee on Labor and Public Welfare and the Committee on Finance of the Senate.

(2) The corporation may, in its discretion, pay benefits guaranteed under this subchapter with respect to a multiemployer plan which terminates after September 2, 1974, and before January 1, 1978, if—

(A) the plan was maintained during the 60 months immediately preceding the date on which the plan terminates, and

(B) the corporation determines that the payment by the corporation of benefits guaranteed under this subchapter with respect to that plan will not jeopardize the payments the corporation anticipates it may be required to make in connection with benefits guaranteed under this subchapter with respect to multiemployer plans which terminate after December 31, 1977.

29 U.S.C. (SUPP. V 1981).

§ 1381. Withdrawal liability established; criteria and definitions

(a) If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability.

§ 1387. Reduction or waiver of complete withdrawal liability; procedures and standards applicable

(a) The corporation shall provide by regulation for the reduction or waiver of liability for a complete withdrawal in the event that an employer who has withdrawn from a plan subsequently resumes covered operations under the plan or renews an obligation to contribute under the plan, to the extent that the corporation determines that reduction or waiver of withdrawal liability is consistent with the purposes of this chapter.

(b) The corporation shall prescribe by regulation a proceedure and standards for the amendment of plans to provide alternative rules for the reduction or waiver of liability for a complete withdrawal in the event that an employer who has withdrawn from the plan subsequently resumes covered operations or renews an obligation to contribute

under the plan. The rules may apply only to the extent that the rules are consistent with the purposes of this chapter.

§ 1397. Application of part in case of certain pre-1980 withdrawals; adjustment of covered plan

(a) For the purpose of determining the amount of unfunded vested benefits allocable to an employer for a partial or complete withdrawal from a plan which occurs after April 28, 1980, and for the purpose of determining whether there has been a partial withdrawal after such date, the amount of contributions, and the number of contribution base units, of such employer properly allocable—

(1) to work performed under a collective bargaining agreement for which there was a permanent cessation of the obligation to contribute before April 29, 1980, or

(2) to work performed at a facility at which all covered operations permanently ceased before April 19, 1980, or for which here was a permanent cessation of the obligation to contribute before that date,

shall not be taken into account.

(b) A plan may, in a manner not inconsistent with regulations, which shall be prescribed by the corporation, adjust the amount of unfunded vested benefits allocable to other employers under a plan maintained by an employer described in subsection (a) of this section.

§ 1399. Notice, collection, etc. of withdrawal liability

(a) Furnishing of information by employer to plan sponsor

An employer shall, within 30 days after a written request from the plan sponsor, furnish such information as the plan sponsor reasonably determines to be necessary to enable the plan sponsor to comply with the requirements of this part.

(b) Notification, demand for payment, and review upon complete or partial withdrawal by employer

(1) As soon as practicable after an employer's complete or partial withdrawal, the plan sponsor shall—

(A) notify the employer of—

(i) the amount of the liability, and

(ii) the schedule for liability payments, and

(B) demand payment in accordance with the schedule.

(2)(A) No later than 90 days after the employer receives the notice described in paragraph (1), the employer—

(i) may ask the plan sponsor to review any specific matter relating to the determination of the employer's liability and the schedule of payments,

(ii) may identify any inaccuracy in the determination of the amount of the unfunded vested benefits allocable to the employer, and

(iii) may furnish any additional relevant information to the plan sponsor.

(B) After a reasonable review of any matter raised, the plan sponsor shall notify the employer of—

(i) the plan sponsor's decision,

(ii) the basis for the decision, and

(iii) the reason for any change in the determination of the employer's liability or schedule of liability payments.

(c) Payment requirements; amount, etc.

(1)(A)(i) Except as provided in subparagraphs (B) and (D) of this paragraph and in paragraphs (4) and (5), an employer shall pay the amount determined under section 1391 of this title, adjusted if appropriate first under section 1389 of this title and then under section 1386 of this title over the period of years necessary to amortize the amount in level annual payments determined under subparagraph (C), calculated as if the first payment were made on the first day of the plan year following the plan year in which the withdrawal occurs and as if each subsequent payment were made on the first day of each subsequent plan year. Actual payment shall commence in accordance with paragraph (2).

(ii) The determination of the amortization period described in clause (i) shall be based on the assumptions used for the most recent actuarial valuation for the plan.

(B) In any case in which the amortization period described in subparagraph (A) exceeds 20 years, the employer's liability shall be limited to the first 20 annual payments determined under subparagraph (C).

(C)(i) Except as provided in subparagraph (E), the amount of each annual payment shall be the product of—

(I) the average annual number of contribution base units for the period of 3 consecutive plan years, during the period of 10 consecutive plan years ending before the plan year in which the withdrawal occurs, in which the number of contribution base units for which the employer had an obligation to contribute under the plan is the highest, and

(II) the highest contribution rate at which the employer had an obligation to contribute under the plan during the 10 plan years ending with the plan year in which the withdrawal occurs.

For purposes of the preceding sentence, a partial withdrawal described in section 1385(a)(1) of this title shall be deemed to occur on the last day of the first year of the 3-year testing period described in section 1385(b)(1)(B)(i) of this title.

(ii)(I) A plan may be amended to provide that for any plan year ending before 1986 the amount of each annual payment shall be (in lieu of the amount determined under clause (i)) the average of the require employer contributions under the plan for the period of 3 consecutive plan years (during the priod of 10 consecutive plan years ending with the plan year preceding the plan year in which the withdrawal occurs) for which such required contributions were the highest.

(II) Subparagraph (B) shall not apply to any plan year to which this clause applies.

(III) This clause shall not apply in the case of why withdrawal described in subparagraph (D.)

(IV) If under a plan this clause applies to any plan year but does not apply to the next plan year, this clause shall not apply to any plan year after such next plan year.

(V) For purposes of this clause, the term "required contributions" means, for any period, the amounts which the employer was obligated to contribute for such period (not taking into account any delinquent contribution for any other period).

(iii) A plan may be amended to provide that for the first plan year ending on or after April 29, 1980, the number "5" shall be substituted for the number "10" each place it appears in clause (i) or clause (ii) (whichever is appropriate). If the plan is so amended, the number "5" shall be increased by one for each succeeding plan year until the number "10" is reached.

(D) In any case in which a multiemployer plan terminates by the withdrawal of every employer from the plan, or in which substantially all the employers withdraw from a plan pursuant to an agreement or arrangement to withdraw from the plan—

(i) the liability of each such employer who has withdrawn shall be determined (or redetermined) under this paragraph without regard to subparagraph (B), and

(ii) notwithstanding any other provision of this part, the total unfunded vested benefits of the plan shall be fully allocated among all such employers in a manner not inconsistent with regulations which shall be prescribed by the corporation.

Withdrawal by an employer from a plan, during a period of 3 consecutive plan years within which substantially all the employers who have an obligation to contribute under the plan withdraw, shall be presumed to be a withdrawal pursuant to an agreement or arrangement, unless the employer proves otherwise by a preponderance of the evidence.

(E) In the case of a partial withdrawal described in section 1385(a) of this title, the amount of each annual payment shall be the product of—

(i) the amount determined under subparagraph (C) (determined without regard to this subparagraph), multiplied by

(ii) the fraction determined under section 1386(a)(2) of this title.

(2) Withdrawal liability shall be payable in accordance with the schedule set forth by the plan sponsor under subsection (b)(1) of this section beginning no later than 60 days after the date of the demand notwithstanding any request for review or appeal of determinations of the amount of such liability or of the schedule.

(3) Each annual payment determined under paragraph (1)(C) shall be payable in 4 equal installments due quarterly, or at othe intervals specified by plan rules. If a payment is not made when due, interest on the payment shall accrue from the due date until the date on which the payment is made.

(4) The employer shall be entitled to prepay the outstanding amount of the unpaid annual withdrawal liability payments determined under paragraph (1)(C), plus accrued interest, if any, in whole or in part, without penalty. If the prepayment is made pursuant to a withdrawal which is later determined to be part of a withdrawal described in paragraph (1)(D), the withdrawal liability of the employer shall not be limited to the amount of the prepayment.

(5) In the event of a default, a plan sponsor may require immediate payment of the outstanding amount of an

employer's withdrawal liability, plus accrued interest on the total outstanding liability from the due date of the first payment which was not timely made. For purposes of this section, the term "default" means—

(A) the failure of an employer to make, when due, any payment under this section, if the failure is not cured within 60 days after the employer receives written notification from the plan sponsor of such failure, and

(B) any other event defined in rules adopted by the plan which indicates a substantial likelihood that an employer will be unable to pay its withdrawal liability.

(6) Except as provided in paragraph (1)(A)(ii), interest under this subsection shall be charged at rates based on prevailing market rates for comparable obligations, in accordance with regulations prescribed by the corporation.

(7) A multiemployer plan may adopt rules for other terms and conditions for the satisfaction of an employer's withdrawal liability if such rules—

(A) are consistent with this chapter, and

(B) are not inconsistent with regulations of the corporation.

(8) In the case of a terminated multiemployer plan, an employer's obligation to make payments under this section ceases at the end of the plan year in which the assets of the plan (exclusive of withdrawal liability claims) are sufficient to meet all obligations of the plan, as determined by the corporation.

(d) Applicability of statutory prohibitions

The prohibitions provided in section 1106(a) of this title do not apply to any action required or permitted under this part.

§ 1401. Resolution of disputes.

(a) Arbitration proceedings; matters subject to arbitration, procedures applicable, etc.

(1) Any dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under sections 1381 through 1399 of this title shall be resolved through arbitration. Either party may initiate the arbitration proceeding within a 60-day period after the earlier of—

(A) the date of notification to the employer under section 1399(b)(2)(B) of this title, or

(B) 120 days after the date of the employer's request under section 1399(b)(2)(A) of this title.

The parties may jointly initiate arbitration within the 180-day period after the date of the plan sponsor's demand under section 1399(b)(1) of this title.

(2) An arbitration proceeding under this section shall be conducted in accordance with fair and equitable procedures to be promulgated by the corporation. The plan sponsor may purchase insurance to cover potential liability of the arbitrator. If the parties have not provided for the costs of the arbitration, including arbitrator's fees, by agreement, the arbitrator shall assess such fees. The arbitrator may also award reasonable attorney's fees.

(3)(A) For purposes of any proceeding under this sec-

tion, any determination made by a plan sponsor under sections 1381 through 1399 of this title and section 1405 of this title is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous.

(B) In the case of the determination of a plan's unfunded vested benefits for a plan year, the determination is presumed correct unless a party contesting the determination shows by a preponderance of evidence that—

(i) the actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations), or

(ii) the plan's actuary made a significant error in applying the actuarial assumptions or methods.

(b) Alternative collection proceedings; civil action subsequent to arbitration award; conduct of arbitration proceedings

If no arbitration proceeding has been initiated pursuant to subsection (a) of this section, the amounts demanded by the plan sponsor under section 1399(b)(1) of this title shall be due and owing on the schedule set forth by the plan sponsor. The plan sponsor may bring an action in a State or Federal court of competent jurisdiction for collection.

(2) Upon completion of the arbitration proceedings in favor of one of the parties, any party thereto may bring an action, no later than 30 days after the issuance of an arbitrator's award, in an appropriate United States district court in accordance

with section 1451 of this title to enforce, vacate, or modify the arbitrator's award.

(3) Any arbitration proceedings under this section shall, to the extent consistent with this subchapter, be conducted in the same manner, subject to the same limitations, carried out with the same powers (including subpoena power), and enforced in United States courts as an arbitration proceeding carried out under title 9.

(c) Presumption respecting finding of fact by arbitrator

In any proceeding under subsection (b) of this section, there shall be a presumption, rebuttable only by a clear preponderance of this evidence, that the findings of fact made by the arbitrator were correct.

(d) Payments by employer prior and subsequent to determination by arbitrator; adjustments; failure of employer to make payments

Payments shall be made by an employer in accordance with the determinations made under this part until the arbitrator issues a final decision with respect to the determination submitted for arbitration, with any necessary adjustments in subsequent payments for overpayments or underpayments arising out of the decision of the arbitrator with respect to the determination. If the employer fails to make timely payment in accordance with such final decision, the employer shall be treated as being delinquent in the making of a contribution required under the plan (within the meaning of section 1145 of this title).

(e) Furnishing of information by plan sponsor to employer respecting computation of withdrawal liability of employer; fees

If any employer requests in writing that the plan sponsor make available to the employer general information necessary for the employer to compute its withdrawal liability with respect to the plan (other than information which is unique to that employer), the plan sponsor shall furnish the information to the employer without charge. If any employer requests in writing that the plan sponsor make an estimate of such employer's potential withdrawal liability with respect to the plan or to provide information unique to that employer, the plan sponsor may require the employer to pay the reasonable cost of making such estimate or providing such information.

§ 1451. Civil actions

(a) Persons entitled to maintain actions

(1) A plan fiduciary, employer, plan participant, or beneficiary, who is adversely affected by the act or omission of any party under this subtitle with respect to a multiemployer plan, or an employee organization which represents such a plan participant or beneficiary for purposes of collective bargaining, may bring an action for appropriate legal or equitable relief, or both.

(2) Notwithstanding paragraph (1), this section does not authorize an action against the Secretary of the Treasury, the Secretary of Labor, or the corporation.

(b) Failure of employer to make withdrawal liability payment within prescribed time

In any action under this section to compel an employer to pay withdrawal liability, any failure of the employer to make any withdrawal liability payment within the time prescribed shall be treated in the same manner as a delinquent contribution (within the meaning of section 1145 of this title).

(c) Jurisdiction of Federal and State courts

The district courts of the United States shall have exclusive jurisdiction of an action under this section without regard to the amount in controversy, except that State courts of competent jurisdiction shall have concurrent jurisdiction over an action brought by a plan fiduciary to collect withdrawal liability.

(d) Venue and service of process

An action under this section may be brought in the district where the plan is administered or where a defendant resides or does business, and process may be served in any district where a defendant resides, does business, or may be found.

(e) Costs and expenses

In any action under this section, the court may award all or a portion of the costs and expenses incurred in connection with such action, including reasonable attorney's fees, to the prevailing party.

(f) Time limitations

An action under this section may not be brought after the later of –

(1) 6 years after the date on which the cause of action arose, or

(2) 3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; except that in the case of fraud or concealment, such action may be brought not later than 6 years after the date of discovery of the existence of such cause of action.

(g) Service of complaint on corporation; intervention by corporation

A copy of the complaint in any action under this section or section 1401 of this title shall be served upon the corporation by certified mail. The corporation may intervene in any such action.

§1461. Effective date; special rules

(a) The provisions of this subchapter take effect on September 2, 1974.

(b) Notwithstanding the provisions of subsection (a) of this section, the corporation shall pay benefits guaranteed under this subchapter with respect to any plan –

(1) which is not a multiemployer plan,

(2) which terminates after June 30, 1974, and before September 2, 1974,

(3) to which section 1321 of this title would apply if that section were effective beginning on July 1, 1974, and

(4) with respect to which a notice is filed with the Secretary of Labor and received by him not later than 10 days after September 2, 1974, except that, for reasonable cause shown, such notice may be filed with the Secretary of Labor and received by him not later than October 31, 1974, stating that the plan is a plan described in paragraphs (1), (2), and (3).

The corporation shall not pay benefits guaranteed under this subchapter with respect to a plan described in the preceding sentence unless the corporation finds substantial evidence that the plan was terminated for a reasonable business purpose and not for the purpose of obtaining the payment of benefits by the corporation under this subchapter or for the purpose of avoiding the liability which might be imposed under subtitle D of this subchapter if the plan terminated on or after September 2, 1974. The provisions of subtitle D of this subchapter do not apply in the case of such a plan which terminates before September 2, 1974. For purposes of determining whether a plan is a plan described in paragraph (2), the provisions of section 1348 of this title shall not apply, but the corporation shall make the determination on the basis of the date on which benefits ceased to accrue or on any other reasonable basis consistent with the purposes of this subsection.

(c)(1) Except as provided in paragraphs (2), (3), and (4), the corporation shall not pay benefits guaranteed under this subchapter with respect to a multiemployer plan which terminates before August 1, 1980. Whenever the corporation exercises the authority granted under paragraph (2) or (3), the corporation shall notify the Committee on Education and Labor and the Committee on Ways and Means of the House of Representatives, and the

Committee on Labor and Human Resources and the Committee on Finance of the Senate.

(2) The corporation may, in its discretion, pay benefits guaranteed under this subchapter with respect to a multiemployer plan which terminates after September 2, 1974, and before August 1, 1980, if –

(A) the plan was maintained during the 60 months immediately preceding the date on which the plan terminates, and

(B) the corporation determines that the payment by the corporation of benefits guaranteed under this subchapter with respect to that plan will not jeopardize the payments the corporation anticipates it may be required to make in connection with benefits guaranteed under this subchapter with respect to multieimployer plans which terminate after July 31, 1980.

* * *

(e)(1) Except as provided in paragraphs (2), (3), and (4), the amendments to this chapter made by the Multiemployer Pension Plan Amendments Act of 1980 shall take effect on September 26, 1980.

(2)(A) Except as provided in this paragraph, part 1 of subtitle E of this subchapter, relating to withdrawal liability, takes effect on April 29, 1980.

APPENDIX G

PUBLIC LAW 95-214 [H.R. 9378]; Dec. 19, 1977
EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

An Act to amend title IV of the Employee Retirement Income Security Act of 1974 to postpone, for two years, the date on which the corporation first begins paying benefits under terminated multiemployer plans.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) section 4082(c) of the Employee Retirement Income Security Act of 1974 (relating to effective dates; special rules) is amended –

(1) by striking, "January 1, 1978" in paragraph (1) and substituting "July 1, 1979";

(2) by striking "January 1, 1978" in paragraph (2) and substituting "July 1, 1979";

(3) by striking "December 31, 1977" in paragraph (2)(B) and substituting "June 30, 1979";

(4) by striking "January 1, 1978" in paragraph (4) and substituting "July 1, 1979";

(5) by striking "December 31, 1977" in paragraph (4)(D) and substituting "June 30, 1979".

(b) Section 4082 of such Act is amended by adding at the end thereof the following new subsections:

"(d) The corporation shall present to the Committee on Education and Labor of the House of Representatives and the Committee on Human Resources and the Committee on Finance of the Senate a report which comprehensively

addresses the anticipated financial condition of the program relating to mandatory coverage of multiemployer plans, including possible events which might cause the corporation to experience serious financial difficulty after July 1, 1979. Such report shall include an explanation of any alternative courses of action which might be taken by the corporation to insure proper coverage of multiemployer plans and the proper financing of the program relating to such plans. If the report contains recommendations for amendments to this title, such recommendations shall be fully explained, and shall be accompanied by explanations of other options for legislative change considered and rejected by the corporation. The report shall be presented by July 1, 1978.

PUBLIC LAW 96-24 [H.R. 3915]; June 19, 1979
EMPLOYEE RETIREMENT INCOME SECURITIES ACT OF 1974

An Act to amend title IV of the Employee Retirement Income Security Act of 1974 to postpone for 10 months the date on which the corporation must may benefits under terminated multiemployer plans.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 4082(c) of title IV of the Employee Retirement Income Security Act of 1974 (relating to effective dates; special rules) as amended by Public Law 95-214, is further amended –

(1) by striking "July 1, 1979" in paragraphs (1), (2) and (4) and substituting "May 1, 1980" in each such paragraph; and

(2) by striking "June 30, 1979" in paragraphs 2(B) and 4(D) and substituting "April 30, 1980" in each such paragraph.

Approved June 19, 1979.

PUBLIC LAW 96-239 [H.R. 7140]; April 30, 1980 EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 – BENEFITS

An Act amend title IV of the Employee Retirement Income Security Act of 1974 to postpone for two months the date on which the Pension Benefit Guaranty Corporation must pay benefits under terminated multiemployer plans.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 4082(c) of title IV of the Employee Retirement Income Security Act of 1974 (relating to effective dates; special rules) as amended by Public Law 95-214 and Public Law 96-24, is further amended–

(1) by striking "May 1, 1980" in paragraphs (1), (2), and (4) and substituting "July 1, 1980" in each such paragraph; and

(2) by striking "April 30, 1980" in paragraphs 2(B) and 4(D) and substituting "June 30, 1980" in each such paragraph.

Approved April 30, 1980.

PUBLIC LAW 96-293 [H.R. 7685]; June 30, 1980
EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

An Act to amend title IV of the Employee Retirement Income Security Act of 1974 to postpone for one month the date on which the corporation must pay benefits under terminated multiemployer plans.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 4082(c) of title IV of the Employee Retirement Income Security Act of 1974 (relating to effective dates; special rules) as amended by Public Law 95-214, Public Law 96-24, and Public Law 96-239 is further amended—

(1) by striking "July 1, 1980" in paragraphs (1), (2), and (4) and substituting "August 1, 1980" in each such paragraph; and

(2) by striking "June 30, 1980" in paragraphs 2(B) and 4(D) and subtituting "July 31, 1980" in each such paragraph.

Approved June 30, 1980.

APPENDIX H

PENSION BENEFIT GUARANTY CORPORATION

Multiemployer Study

Required By

P.L. 95-214

– JULY 1, 1978 –

TABLE OF CONTENTS

* * * * *

[57] Under this arrangement, there would be no employer liability per se, but there would be an obligation to continue funding the plan at the rate established in collective bargaining. As a control on potential abuse, this rate would be required to be at least the same percent of the monetary wage package as that negotiated before the plan qualified for reorganization.[15]

---

[14]Cont.)

reorganization appeared necessary would not be eligible for PBGC ongoing financial assistance, and if it terminated it would be subject to the guarantee and employer liability provisions discussed in Section D, below. The two exceptions are:

(1) Plans that are already at Level II at the time the program is enacted. On the basis of preliminary PBGC data, the number of plans that would immediately qualify for Level II reorganization is relatively small and only a few plans would immediately qualify for financial assistance.

(2) Plans which do not qualify for Level I reorganization but which, during a short period (one or two plans years), experience sharp declines in the contribution base or in the level of plan assets large enough to qualify the plan for Level II reorganization.

[15]The PBGC is studying whether additional controls may be necessary to assure that contributions are at a reasonable level relative to benefit levels promised by the plan. Possible ways to restrict the use of premium funds to the most deserving plans would be to limit further the conditions under which PBGC assistance is provided or to restrict the amount of assistance unless the PBGC makes an individual finding of need.

c. Guarantees and Employer Liability for Terminated Plans

The significant variables in restructuring termination insurance are employer liability and the amount of guaranteed benefits. These are the two variables that PBGC can utilize to control the incidence of termination (encourage plan continuance) and program costs for those [58] plans that do not terminate. Employer liability represents the cost to the employer, and to a certain extent to participants, of plan termination, while the level of guarantees represents the cost to participants of plan termination. High guarantees and low employer liability, for example, may result in a high incentive for termination and high program costs, because of the low cost of termination to all parties to the plan. Conversely, low guarantees and high employer liability should result in a low incidence of termination and modest program costs, at least initially, because of the high cost of plan termination on all parties. The latter, however, could have adverse long-run consequences on the growth and continuance of multiemployer plans and the insurance program, because multiemployer plans could be less attractive to employers and participants than other types of benefit arrangements, thus resulting in a loss of current and potential contributors.

Section D of this part of the report presents five alternative approaches to termination guarantees and employer liability which PBGC is considering to control the incidence of terminations and program costs. They are:

(1) employer liability for full vested benefits and reduced benefit guarantees,

(2) employer liability for guaranteed benefits only and reduced benefit guarantees,

(3) no employer liability and no benefit guarantees,[16]

(4) employer liability for guaranteed benefits only and reduced benefit guarantees if the plan imposes withdrawal liability on withdrawing employers, otherwise no benefit guarantees and no employer liability, and

(5) employer liability only for the guaranteed benefits of retirees and those within five years of normal retirement, and benefit guarantees only for such participants.

Under these approaches, with the exception of Program 3, employer liability would not be limited to 30 percent of net worth, *i.e.*, the present statutory limit,[17] but instead employers would continue to fund their share of the unfunded termination liability. This approach mitigates the major administrative and cost problems posed by a determination of net worth as well as the possible incentive for termination in the event that termination were more

[16]In order to assure that benefits are protected under this option, reorganization and PBGC financial assistance for insolvent reorganized plans would be necesssary.

[17]See Erisa § 4062 (b).